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No._____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

THE STATE BAR OF TEXAS, PETITIONER,

V.

CHARLES BEN HOWELL, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

This federal action was initiated by Charles Ben Howell to consider various constitutional challenges to an attorney disciplinary proceeding pending in Texas state court. After a state court judgment imposing a public reprimand on Charles Ben Howell was made final by action of the Supreme Court of Texas, the federal district court, which had retained jurisdiction throughout, dismissed its action for want of subject matter jurisdiction. See page A-13 of Appendix hereto. The Fifth Circuit reversed and remanded for trial of the constitutional claims of Charles Ben Howell primarily because it concluded he had been deprived of a full and fair opportunity to litigate his federal claims in state court. No federal issues were raised or decided in state court because Charles Ben Howell expressly reserved them for subsequent federal adjudication, purportedly in reliance on a statement included in an order of the federal district court. See page A-11 of Appendix hereto.

1. Whether, after state appellate remedies have been exhausted, a federal district court may consider a constitutional challenge to a state court judgment entered in an attorney disciplinary proceeding?

2. Whether a party is deprived of a full and fair opportunity to litigate federal constitutional issues in state court if he fails to raise those issues through no fault of the state court or of the opposing parties?

3. Whether, in a §1983 action in federal court, the mandate of full faith and credit or the federal doctrine of res judicata prevents the adjudication of constitutional issues which could have been but were not raised in a prior state court proceeding?

Although Franklin L. Jones, Jr. and Jerry L. Zunker, President and General Counsel of the State Bar of Texas respectively, were joined as defendants with the State Bar of Texas in the courts below, they have no interest as individuals in the outcome of this case.

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The State Bar of Texas, petitioner herein, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on May 3, 1982.

OPINION BELOW

The opinion of the Court of Appeals is reported in volume 674 of the Federal Reporter, second series, beginning on page 1027, (674 F.2d 1027). No opinion was rendered by the United States District Court for the Northern District of Texas.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on May 3, 1982. A timely petition for rehearing was

denied on May 27, 1982, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

28 U.S.C. §1738: State and Territorial statutes and judicial proceedings; full faith and credit.

The Acts of the legislature of any State, Territory, or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory or Possession thereto.

The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.

Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

STATEMENT OF THE CASE

Charles Ben Howell was, in 1971, and is now an attorney licensed to practice in the State of Texas. As a result of certain events occurring in 1971, a complaint was made charging him with conduct in violation of the Texas Code of Professional Responsibility. The nature of these events are explained in the opinion of the Court of Civil Appeals of Texas (559 S.W.2d 432), included on pp. A-14-A-23 of the Appendix hereto. After administrative proceedings on this complaint were completed, the State Bar of Texas, through its Grievance Committee for State Bar District 6, brought suit on October 29, 1974 in Texas state court asking that Charles Ben Howell be disbarred, suspended, or reprimanded.

On February 19, 1976, while the disbarment action was still pending in state trial court, Charles Ben Howell initiated this action in the United States District Court for the Northern District of Texas (hereinafter referred to as the district court). He invoked the jurisdiction of that court under 28 U.S.C. §1343 seeking, primarily through 42 U.S.C. §1983, declaratory and injunctive relief from the disbarment proceeding in state court. Charles Ben Howell filed written notice of his federal action in state court on February 25, 1976. See p. A-24 of Appendix hereto.

On March 4, 1976, the district court, in denying a motion by Charles Ben Howell for a preliminary injunction, entered an order which also included the following:

> Plaintiff of course has the right to raise federal constitutional issues in federal court, should that prove necessary after the state court proceeding is completed. *England v. Board of Medical Examiners,* 375 U.S. 411 (1964).
>
> (See p. A-11 of Appendix hereto.)

Shortly after the entry of this order, Charles Ben Howell filed his First Original Amended Answer in state court expressly reserving his federal constitutional claims for adjudication in federal court. See p. A-34 of Appendix hereto. The state courts did, however, decide certain issues he raised under the equal protection and due process provisions of the Texas Constitution. See p. A-19 of Appendix hereto.

A judgment was entered by the state trial court on September 21, 1976 imposing a public reprimand on Charles Ben Howell. This judgment was affirmed by the Texas Court of Civil Appeals on November 23, 1977 (see p. A-14 of Appendix hereto); and the Texas Supreme Court refused to review this decision, finding no reversible error, on May 17, 1978. Charles Ben Howell then filed another motion for preliminary injunction in the federal district court, which had retained jurisdiction. On July 10, 1978, the district court granted this motion and enjoined the State Bar of Texas and the Texas courts from giving effect to the state court

judgment. For reasons that remain obscure, former counsel for the State Bar of Texas in the federal action failed to oppose the entry of this preliminary injunction.

It was not until December 22, 1980 that the district court upon motion by the State Bar of Texas dissolved its preliminary injunction and dismissed this action. See p. A-13 of Appendix hereto. Subsequently, the public reprimand was published in the February, 1981 edition of the *Texas Bar Journal*.

Prior to its dismissal, however, the district court gave Charles Ben Howell leave to file his Second Amended Complaint (see p. A-46 of Appendix hereto) which constitutes his final pleading for the purpose of determining the claims made in this federal action. In this pleading he seeks injunctive relief from the enforcement of the state court judgment and a declaration that the judgment was entered in violation of his rights under the Equal Protection, Due Process, and Privileges and Immunities Clauses of the fourteenth amendment to the United States Constitution. See p. A-50 of Appendix hereto. In essence, his prayer is for expungement of the state court judgment from the records maintained in regard to attorneys licensed in this state. See p. A-50 of Appendix hereto.

The Fifth Circuit in the decision below reversed the district court's dismissal and remanded for trial on the merits of the federal constitutional claims of Charles Ben Howell. See p. A-9 of Appendix hereto. The Fifth Circuit assumed the district court's dismissal was premised on jurisdictional grounds (see p. A-5 of Appendix hereto) and concluded that under the law of this circuit a district court, while generally without jurisdiction to review the final judgments of the highest court of a state, could exercise jurisdiction when review of that judgment by the United States Supreme Court was unavailable. See pp. A-6-A-8 of Appendix hereto. Since no federal questions were raised or decided in the state court, review of that judgment by this Court was deemed unavailable by the Fifth Circuit, which disregarded Charles Ben Howell's failure to seek such review.

In Part III of its opinion, the Fifth Circuit acknowledged that it would ordinarily apply res judicata to forbid litigation in federal

court of issues that might have been raised in a prior state court proceeding (see p. A-8 of Appendix hereto) but refused in this case to punish Charles Ben Howell for his reliance on the federal district court's guidance. See p. A-9 of Appendix hereto. The court recognized that the promise extended to Charles Ben Howell by the district court was erroneous, but it held that because he relied on that promise and sought to reserve his federal claims under *England* he was deprived of a full and fair opportunity to litigate those claims in state court. See p. A-9 of Appendix hereto. The Fifth Circuit stated further that it was not establishing a "simple justice" exception to res judicata but was instead relying on a "hybrid of the *England* and full and fair opportunity exceptions" to excuse Charles Ben Howell from the application of both the doctrine of res judicata and the mandate of full faith and credit. See p. A-9 of Appendix hereto, with particular reference to footnote 9 of the Fifth Circuit's opinion.

REASONS FOR GRANTING THE WRIT

1. THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF OTHER COURTS OF APPEALS IN REGARD TO THE APPLICATION OF RES JUDICATA.

In *Lovely v. Laliberte*, 498 F.2d 1261 (1st Cir.), *cert. denied*, 419 U.S. 1038 (1974), the First Circuit held that the failure of a party's attorney to assert constitutional defenses in a state eviction proceeding could not justify allowing that party to escape the application of res judicata in a subsequent §1983 action in federal court. In commenting on Lovely's claim that his attorney in the state proceeding had been "derelict," the court stated that the "principle behind res judicata, the prevention of duplicative litigation, has the same force regardless of the ultimate 'reason' for the second suit." 498 F.2d at 1264. The court did note in its opinion that it was "possible that a parallel [*England*] reservation might preserve a federal constitutional defense and counterclaim in a state possession action"; but since none was made, the court concluded that Lovely could "therefore not escape the ordinary effect of res judicata." *Id.* at 1263-64. This dictum is best understood, however, as only evidencing the court's acceptance of such a

"possibility" solely for the purpose of rejecting Lovely's argument on that basis.

The clearest conflict between *Lovely* and the Fifth Circuit's decision is in regard to the question whether res judicata should be applied against a claimant who had a good reason for the failure to assert constitutional claims in a prior state court proceeding. The Fifth Circuit believed itself free to consider such reasons while the First Circuit in *Lovely* believed itself controlled by res judicata no matter why a party sought to bring the subsequent federal action. One distinction that appears at first glance is that Lovely was disadvantaged because of the omissions of his attorney, while Charles Ben Howell was held to have relied on the erroneous promise of the federal district court.[1] Upon further analysis, however, one must conclude that this distinction misses the point. Charles Ben Howell's lawyer could have been considered derelict in relying on the district court's promise which, as the Fifth Circuit saw it, was not supported by law. See p. A-8 of Appendix hereto. Lovely's attorney had, in fact, made a conscious decision not to raise first amendment defenses in state court because he thought it would be "unwise" to assert them there. 498 F.2d at 1263 n. 1. The attorney for Charles Ben Howell, who himself is an attorney,

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1. The State Bar of Texas contends that Charles Ben Howell did not rely on the district court's promise since the decision to reserve his federal claims appears to have been made before the district court entered its order on March 4, 1976. On February 25, 1976, he gave notice to the state court of his federal action and filed with this notice a copy of his federal complaint which listed a number of his federal constitutional claims. See p. A-25 of Appendix hereto. It is reasonable to conclude that since he had commenced a federal action to litigate his federal constitutional claims and had given notice of this fact to the state court, he clearly intended at the time he gave notice to have those federal claims adjudicated in federal not state court.

   Furthermore, when Charles Ben Howell returned to federal district court after the state proceeding had been completed he filed his Second Amended Complaint (see p. A-46 of Appendix hereto) which, almost entirely, includes constitutional claims not contained in his earlier federal pleadings. Since these additional claims were not brought to the attention of the state courts, he failed at least in part to comply with the requirements of the *England* case. *See England v. Louisiana State Board of Medical Examiners*, 375 U.S. 411, 420 (1964).

also made an erroneous decision with perhaps the same hope in mind, that is, to have the federal issues adjudicated in a federal not state court. The only real distinction is in regard to the legal bases used by the different attorneys for concluding that such a strategy would succeed. The First Circuit necessarily considered this point irrelevant since it refused to consider any error of one's attorney as an exception from the effect of res judicata. *Id.* at 1264.

In *Coogan v. Cincinnati Bar Association,* 431 F.2d 1209 (6th Cir. 1970), the Sixth Circuit considered a civil rights action brought to challenge the constitutionality of an indefinite suspension from the practice of law ordered by the Supreme Court of Ohio. Coogan had failed to appear personally during the disciplinary proceeding, and though he was represented by counsel of his own choosing, there was no indication any evidence was offered in defense of the charges. Subsequent to the order of the Supreme Court of Ohio, he challenged the indefinite suspension in federal court, claiming that he had entered into an agreed suspension of practice for six months with the Cincinnati Bar Association and that, therefore, his subsequent indefinite suspension violated the constitutional prohibition of double jeopardy. Coogan also claimed he was deprived of a right of confrontation under the fifth and fourteenth amendments because of the introduction of an affidavit in evidence. *Id.* at 1210.

The Sixth Circuit held that res judicata precluded federal litigation of the issues "which he might have presented" in state court. *Id.* at 1211. Immediately after this language, the court cited *Burton, Inc. v. Durkee,* 162 Ohio St. 433, 438, 123 N.E.2d 432, 435 (Ohio 1954), which states, as a matter of Ohio law, the same rule. The Sixth Circuit did not expressly consider a claim that Coogan failed because of his agreement with the Cincinnati Bar Association to assert his federal claims in state court, but such an excuse seems strongly indicated by the nature of the double jeopardy claim and by a notation in the record of the state proceeding, quoted by the Sixth Circuit, that implied Coogan had ceased practicing law in compliance with a voluntary suspension agreement. *See* 431 F.2d at 1210. Certainly a legitimate reading of the court's holding is that it saw any such excuse as irrelevant to the application of either res judicata or the mandate of full faith and credit.

The Sixth Circuit also stated that Coogan had an "adequate remedy for review of his suspension by petitioning the Supreme Court of the United States," but "[h]e chose not to resort to that remedy." *Id.* at 1211. The facts as given in the opinion show, however, that Coogan would have had the same or even less likelihood of obtaining review in this Court as Charles Ben Howell, since he raised no issues whatever in the state proceeding. This statement, though dictum, does evidence the Sixth Circuit's unconcern with availability of review in this Court as it might bear on the right to a federal trial forum.

The Fifth Circuit's decision in this case also conflicts in principle with the decisions of other circuits which, without qualification, apply res judicata to foreclose federal litigation of constitutional issues in §1983 actions when those issues could have been but were not raised in a prior state proceeding. *See Robbins v. District Court of Worth City, Iowa,* 592 F.2d 1015, 1017 (8th Cir.), *cert. denied,* 444 U.S. 852 (1979); *Scoggin v. Schrunk,* 522 F.2d 436, 437 (9th Cir. 1975), *cert. denied,* 423 U.S. 1066 (1976); *Spence v. Latting, 512 F.2d 93, 98 (10th Cir.), cert. denied,* 423 U.S. 896 (1975); *Blankner v. City of Chicago,* 504 F.2d 1037, 1040-41 (7th Cir. 1974), *cert. denied,* 421 U.S. 948 (1975). When a party brings a §1983 action in federal court on constitutional grounds which could have been raised in a prior state proceeding, quite often the failure to raise those claims could be said to have resulted from an error of counsel. In the *Robbins* case the facts indicated that constitutional defenses had been raised in regard to one statutory provision used as a basis for seeking the termination of parental rights of the defendants in state court but not in regard to another. 592 F.2d at 1017. There may, of course, be a wide variety of reasons for a party's decision to withhold federal claims from a state court proceeding, but it is only when the state court prevents the raising of these issues or prevents their full and fair adjudication that neither res judicata nor *Younger* abstention should apply.

2. THE DECISION BELOW TURNS ON ISSUES WHICH HAVE NOT BEEN BUT SHOULD BE SETTLED BY THIS COURT.

Had the Fifth Circuit simply decided that because of the unique facts of this case the interests of justice required opening the doors of the federal district court, the State Bar of Texas would not feel compelled to seek review in this Court. This is not itself a case in which the public interest would be immediately and seriously endangered by further litigation in federal court since the enforcement of the state judgment will not be delayed.

The Fifth Circuit did not, however, so decide this case. It reached its decision through the creation of two relatively amorphous exceptions to three of the rules asserted to preclude further federal litigation. Moreover, its second, "hybrid" exception or at least the "full-and-fair-opportunity" component thereof (see p. A-9 of Appendix hereto) is arguably applicable to another doctrine argued by the State Bar of Texas to preclude this federal litigation, that is, *Younger* abstention. Interpreting the decision below solely in light of its facts is made more difficult because the Fifth Circuit expressly distinguished this case from one in which "simple justice" or public policy called for an exception to res judicata. See p. A-9 of Appendix hereto. This Court had, of course, previously refused to accept such generalized exceptions to that doctrine. *See Federated Department Stores v. Moitie,* 452 U.S. 394, 399 (1980). Also, by not requiring that the responsibility for the failure to raise federal constitutional issues be traced to acts of either the state court or to acts of the opposing parties in that court, the Fifth Circuit freed its exception from a relevant, limiting factor and thereby made it more subject to expansive interpretation.

The Fifth Circuit also held that the original jurisdiction of the federal district court could be invoked because United States Supreme Court review of the state court judgment was unavailable. This holding seems necessarily based on the questionable assumption that a party has a right to at least one federal forum in which to raise his federal claims. The major concern of the State Bar of Texas, however, is that this holding will encourage

defendants in attorney disciplinary proceedings to withhold their federal claims from state court in hopes of thereby enabling themselves to subsequently invoke the jurisdiction of federal district courts. It is reasonable to suggest that such parties, perhaps foreseeing little likelihood of success on the merits of these constitutional claims or of obtaining Supreme Court review, might seek to use the opening provided by the Fifth Circuit to initiate federal litigation to challenge or halt the enforcement of state court orders. Furthermore, to the extent these threshold federal issues are complicated by ambiguous statements of exceptions, the federal courts will be understandably hesitant to deny such litigants adjudication on their constitutional claims.

The Fifth Circuit's decision cannot be said to conflict directly with any decision of this Court although the State Bar of Texas argues it does conflict with the principles invoked in several. This Court has recently held that the standards established in *Younger v. Harris*, 401 U.S. 37 (1971), must be met to justify federal district court intervention in a pending state attorney disciplinary proceeding. *Middlesex County Ethics Committee v. Garden State Bar Association*, 50 U.S.L.W. 4712, 4715 (U.S. June 21, 1982). No decision by this Court has, however, required the application of *Younger* abstention after all state appellate remedies have been exhausted as to an otherwise *Younger*-protected state proceeding. *Younger* standards must be met to justify federal intervention at least *until* all state appellate remedies have been exhausted, *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 609 (1975); but certain language in the *Huffman* decision can be interpreted to allow federal district court intervention after that point.[2]

The reasons for precluding federal court consideration of claims for injunctive and declaratory relief from pending state criminal and certain civil proceedings also justify preclusion of this interference after state appellate remedies have been exhausted. The Fifth Circuit's decision will require the State Bar of Texas to engage in a second trial of what is essentially the same

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2. "[W]e believe that a necessary concomitant of *Younger* is that a party in appellee's posture must exhaust his state appellate remedies *before seeking* relief in the District Court...." 420 U.S. at 608 (emphasis added).

case to protect its state court judgment. An even more serious concern is that when a state court order imposes suspension or disbarment, a federal court would also enjoin enforcement of that order for the duration of the federal litigation, thereby retaining that attorney on the roll of those licensed to serve the public. These results can hardly be said to be consonant with the concept of federalism as defined in *Younger v. Harris. See* 401 U.S. at 43-45. Virtually all the evils at which *Younger* is directed also inhere in federal district court intervention after a state has provided a litigant the full array of appellate remedies available in its court system. Although the Fifth Circuit did not discuss the applicability of *Younger* abstention, that doctrine was briefed and argued. By necessary implication, it was rejected by the Fifth Circuit, but the reasons for that rejection are unclear. Since it did hold that Charles Ben Howell was deprived of a full and fair opportunity to litigate his federal claims in state court and since such an opportunity is also required for application of *Younger* standards, remand by this Court for consideration in light of the *Middlesex County* case might well leave the Fifth Circuit's ultimate holding undisturbed.

There is no question but that the courts of Texas were open to the federal claims of Charles Ben Howell and competent to adjudicate fairly and to enforce effectively his constitutional rights. While the purpose of §1983 and its jurisdictional counterpart is to give the federal trial courts power to protect the people from unconstitutional action even when committed by state courts, that purpose is achieved so long as the federal courts provide an additional forum when the state courts are unable or unwilling to protect federal rights. *See Allen v. McCurry,* 449 U.S. 90, 100-01 (1980). In giving due regard to this purpose, this Court has stated that for *Younger* standards to apply the state court must provide the opportunity to present federal claims but need not ensure that there is an actual hearing on those claims; the absence of an actual hearing or the failure of litigants to avail themselves of such opportunities does not prove that the state procedures were inadequate. *Juidice v. Vail,* 430 U.S. 327, 337 (1977). The "only pertinent inquiry," therefore, is whether a litigant was prevented by the state court from raising his constitutional claims. *See Moore v. Sims,* 442 U.S. 415, 430 (1979).

Having had a full and fair opportunity to raise his federal claims in state court, Charles Ben Howell should not now be able to force the State Bar of Texas back into federal court. In this regard, Texas res judicata rules would preclude subsequent litigation on issues which might have been litigated in the first suit. *Texas Water Rights Commission v. Crow Iron Works,* 582 S.W.2d 768, 771-72 (Tex. 1979). Even though this Court has held that collateral estoppel and the mandate of full faith and credit generally apply in §1983 actions, it has not decided whether a §1983 plaintiff in federal court is precluded from litigating federal issues he could have but did not raise in a prior state court suit against the same adverse party. *See Allen,* 449 U.S. at 97 n. 10.

The Fifth Circuit conceded that res judicata would ordinarily apply even though the constitutional issues were not raised in the state proceeding but held that this rule was not applicable because Charles Ben Howell had been deprived of a full and fair opportunity to litigate them in state court. See pp. A-8-A-9 of Appendix hereto. There seems little justification in the principles represented by res judicata or by 28 U.S.C. §1738 (1976) for penalizing a litigant and undercutting the finality of the judgment of a state court when neither was responsible for the withholding of federal constitutional issues from that state court. In *Allen,* this Court hinted that an exception might well exist if state law did not provide fair procedures or if a state court failed to even acknowledge the existence of the constitutional principle on which a litigant based his claim. 449 U.S. at 96-101. This language, although not conclusive, indicates the proper focus in analysis of the opportunity to litigate for res judicata and, perhaps, §1738 purposes. *See also, Federated Department Stores v. Moitie,* 452 U.S. at 399.

The State Bar of Texas also argued before the Fifth Circuit that jurisdiction to review final state court judgments lies exclusively with the United States Supreme Court. This argument can be based on two decisions of this Court — *Rooker v. Fidelity Trust Co.,* 263 U.S. 413 (1923) and *Theard v. United States,* 354 U.S 278 (1957). In *Rooker* this Court held that a federal district court had no jurisdiction to consider a bill in equity to have declared null and void a state court judgment that had been affirmed by the highest court of the state. To do so, it was stated, would be an exercise of

appellate jurisdiction, which is a power lodged only with the Supreme Court. *Rooker,* 263 U.S. at 416. In *Theard,* while holding that disbarment of an attorney by a state court did not require federal court disbarment, this Court stated that the "state judicatures and the federal judiciary, have autonomous control over the conduct of their officers among whom ... lawyers are included." *Theard,* 354 U.S. at 281. Although this language is dictum, federal courts have relied on *Theard* in stating that federal district courts have no jurisdiction to review state court judgments relating to the admission or disciplining of lawyers. *See Phelps v. Kansas Supreme Court,* 662 F.2d 649, 651 (10th Cir. 1981); *Silverton v. Department of Treasury,* 644 F.2d 1341, 1344 n. 3 (9th Cir.), *cert. denied,* 102 S. Ct. 393 (1981); *Doe v. Pringle,* 550 F.2d 596, 599 (10th Cir. 1976), *cert. denied,* 431 U.S. 916 (1977); *MacKay v. Nesbett,* 412 F.2d 846 (9th Cir.), *cert. denied,* 396 U.S. 960 (1969).

The Fifth Circuit expressed doubt in the decision below as to the continuing vitality of the *Rooker* doctrine. See p. A-6 of Appendix hereto. Nevertheless, it went on to hold that in this circuit a district court was without jurisdiction because of *Rooker* to consider a constitutional challenge to a final state court judgment but only when United States Supreme Court review of that judgment was available. See p. A-6 of Appendix hereto. *But see Gresham Park Community Organization v. Howell,* 652 F.2d 1227, 1236 (5th Cir. 1981). The commentators are also in conflict as to the continuing vitality of the *Rooker* doctrine. *Compare* Chang, *Rediscovering the Rooker Doctrine: Section 1983, Res Judicata and the Federal Courts,* 31 Hastings L.J. 1337, 1355 (1980), *with Developments in the Law-Section 1983 and Federalism,* 90 Harv. L. Rev. 1133, 1334 n. 14 (1977). One commentator has argued that the federal courts have applied *Rooker* when they should have applied res judicata. 18 C. Wright, A. Miller, and E. Cooper, *Federal Practice and Procedure* §4469, at 664 (1981).

The Fifth Circuit expressly held in this case that the restriction on federal district court jurisdiction was dependent on the availability of Supreme Court review (see p. A-8 of Appendix hereto) and thereby divorced this part of its opinion from the nature of Charles Ben Howell's excuse. Considering the practical

limitations on the power of this Court to review state court judgments and the possibility of review even when no federal question is clearly raised in a state proceeding, *see Wood v. Georgia*, 450 U.S. 261, 265 n. 5 (1981), it is not clear what limits really exist for this "unavailability" exception. Moreover, this exception is also clearly applicable in those circuits that restrict district court jurisdiction on the basis of the *Theard* rather than the *Rooker* doctrine.

Finally, the State Bar of Texas admits that it cannot know how the Fifth Circuit's exceptions will be used in the future. It is, however, precisely because their limits cannot be readily discerned that we fear these exceptions will be applied beyond the facts of this case. If nothing else, they are bound to add confusion to an important area of federal law already unduly burdened by too many potentially controlling doctrines. This case presents an opportunity for this Court to determine the controlling rule and thereby alleviate the danger that serious constitutional claims will be lost because of procedural missteps or that individuals will be able to use the federal courts to frustrate the states' attempts to protect the public from unethical practitioners of the law.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Fifth Circuit.

Respectfully Submitted,

JERRY L. ZUNKER
General Counsel
State Bar of Texas

DAVID A. DITTFURTH

STEVEN L. LEE
Assistant General Counsel

Attorneys for Petitioner

August 20, 1982

CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of August, 1982, three (3) copies of the Petition for Writ of Certiorari were mailed, postage prepaid, to Tom McCorkle, Jr., 500 Katy Building, Dallas, Texas 75202, attorney of record for Respondent Howell.

/s/ Jerry L. Zunker

Jerry L. Zunker
P.O. Box 12487
Austin, Texas 78711

APPENDIX

CHRONOLOGY OF RELEVANT EVENTS IN FEDERAL COURTS

1. February 19, 1976	Howell files "Complaint" in federal district court seeking, *inter alia*, that the state disciplinary proceedings be enjoined.
2. March 1, 1976	Howell files "Amended Complaint" which also seeks to enjoin state disciplinary proceedings.
3. March 4, 1976	Order denying Howell's preliminary injunction against state proceedings signed by Judge William Taylor, Jr.
4. March 21, 1977	Fifth Circuit affirms March 4, 1976 denial of preliminary injunction. 551 F.2d 861.
5. June 30, 1978	Howell files "Motion for Preliminary Injunction" seeking to enjoin the State Bar of Texas from treating the judgment of the state court in the disciplinary trial as final and enforceable.
6. July 10, 1978	Preliminary injunction granted. (While not reflected in the injunction, this was apparently an agreed injunction.)
7. June 27, 1980	Howell files his "Second Amended Complaint With Exhibits" attacking the state proceedings.
8. July 24, 1980	Judge Taylor sends a letter to the parties stating he will grant the State Bar's Motion to Dismiss.

9.	December 22, 1980	Order dismissing cause filed.
10.	May 3, 1982	Fifth Circuit reverses and remands for trial on merits.
11.	May 27, 1982	The State Bar's Petition for Rehearing denied.

CHARLES BEN HOWELL,
Plaintiff-Appellant,

v.

STATE BAR OF TEXAS, Et Al.,
Defendants-Appellees.

No. 81-1069.

United States Court of Appeals,
Fifth Circuit.

May 3, 1982.

[674 F.2d 1027]

Appeal from the United States District Court for the Northern District of Texas.

Before CLARK, Chief Judge, THORNBERRY and GARZA, Circuit Judges.

CLARK, Chief Judge:

Charles Ben Howell appeals the district court's dismissal of his civil rights action challenging the result of a state court disciplinary proceeding against him. We reverse the district court's dismissal and remand with instructions that the district court dispose of Howell's federal claims on their merits.

I

On February 19, 1976, Howell filed a civil rights action pursuant to 42 U.S.C. §§ 1983-85 against the State Bar of Texas and three of its officers, seeking declaratory and injunctive relief to prevent his disbarment in a then-pending Texas court proceeding. On March 1, 1976, Howell moved for a preliminary injunction to enjoin prosecution of the state disciplinary action. The district court, in an order of crucial importance to this appeal, denied Howell's motion. That order, issued March 4, 1976, states:

Plaintiff's Motion for Preliminary Injunction was brought before the Court on March 1, 1976. After having heard and considered the affidavits of plaintiff and the oral and written argument of counsel, this Court is of the opinion that the preliminary injunction should be denied. *Huffman v. Pursue, Ltd.*, 420 U.S. 592[,95 S.Ct. 1200, 43 L.Ed.2d 482] (197[5])[;] *Younger v. Harris*, 401 U.S. 37[,91 S.Ct. 746, 27 L.Ed.2d 669] (1971). Plaintiff of course has the right to raise federal constitutional issues in federal court, should that prove necessary after the state court proceeding is completed. *England v. [Louisiana State] Board of Medical Examiners*, 375 U.S. 411[, 84 S.Ct. 461, 11 L.Ed.2d 440] (1964).[1]

On March 9, 1976, the State Bar of Texas moved under Rule 12, Fed.R.Civ.P., for dimissal of Howell's action. No supporting brief was filed at the time.

After trial, Howell was found guilty of professional misconduct and reprimanded by the state court. While his appeal of the reprimand was pending before the Texas Court of Civil Appeals, Howell again moved the federal district court for a preliminary injunction. On April 15, 1977, the district court denied that motion and reaffirmed its March 4, 1976 order.[2] The Texas Court of Civil Appeals affirmed the judgment of the lower court in the disbarment action, a decision the Texas Supreme Court declined to review. *Howell v. State*, 559 S.W.2d 432 (Tex.Civ.App.1977—writ ref'd n.r.e.). Howell presented no federal constitutional claims in the state proceedings at either the trial or appellate level.[3]

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1. The district court's order denying a preliminary injunction was affirmed by this court in an unpublished, per curiam opinion. *Howell v. State Bar of Texas*, 551 F.2d 861 (5th Cir. 1977) (citing Fifth Circuit Rule 21).

2. Howell's appeal of the district court's order was dismissed for want of prosecution due to Howell's failure to file a brief. *Howell v. State Bar of Texas*, No. 77—1805 (5th Cir. Feb. 10, 1978).

3. We have not examined the entire state court record, but note that counsel for the State Bar conceded at oral argument that Howell did not raise his federal claims in the state disciplinary proceeding.

On June 30, 1978, Howell returned to federal court, again seeking a preliminary injunction, this time to enjoin the Texas courts from giving effect to the judgment in the disbarment action. The district court granted Howell's motion on July 10, 1978. *Howell's* case then went through a one-and-a-half year period of dormancy until February 5, 1980, at which time the State Bar of Texas moved the court to dissolve the preliminary injunction and dismiss the action for want of prosecution. The district court denied the State Bar's motion to dismiss on February 25, 1980.

On April 22, 1980, the State Bar submitted a brief in support of the Rule 12 motion to dismiss that it had filed four years earlier. The State Bar's arguments were both jurisdictional and claim-related. Before ruling on the State Bar's motion to dismiss, the district court granted Howell's June 27, 1980 motion for leave to amend his complaint. Howell's second amended complaint, filed that same day, sought a declaration that the state disciplinary proceeding violated the United States Constitution and an injunction barring the State Bar and certain of its officers from enforcing the state judgment. On December 22, 1980, the district court dissolved its earlier preliminary injunction and granted the State Bar's Rule 12 motion to dismiss. The court's order failed to specify which ground or grounds it relied upon in granting the motion to dismiss. On January 13, 1981, the district court denied Howell's Rule 60(b) motion for reconsideration and cited *Kimball v. Florida Bar,* 632 F.2d 1283 (5th Cir. 1980), evidently as authority for its earlier grant of the Rule 12 motion to dismiss. The court's explicit reliance on *Kimball* leads us to conclude that the district court's dismissal was premised on jurisdictional grounds.

Howell now appeals the district court's grant of the State Bar's motion to dismiss and that court's denial of his reconsideration motion. We reverse the district court's dismissal and remand for disposition of Howell's federal constitutional claims on their merits.

II

The State Bar urges affirmance on the ground that Howell's suit seeks review of a state bar disciplinary action, review of which may be had exclusively in the United State Supreme Court. According

to recent Fifth Circuit precedent, relied upon by the State Bar and the district court alike, the federal district courts are without jurisdiction to review state court disciplinary proceedings. *See Kimball v. Florida Bar, supra; Sawyer v. Overton,* 595 F.2d 252 (5th Cir. 1979). In *Sawyer* the attorney-plaintiff had been suspended by the Florida Supreme Court for three months. This court, in affirming the lower court's dismissal of the suit, opined that federal district courts

> hold no warrant to review final judgments of the Florida Supreme Court. That power is reserved to the Supreme Court of the United States. Complaining of constitutional violations, Mr. Sawyer has cast his complaint in the form of a civil rights suit. What he seeks, however, is simply reversal of the state court judgment.... [T]he state proceedings.... could have been reviewed in the Supreme Court. Mr. Sawyer has boarded the wrong flight.

Sawyer v. Overton, 595 F.2d at 252 (citation omitted). But for an odd quirk in this case, *Sawyer* and *Kimball* would be controlling.

The rule of *Sawyer* and *Kimball* is necessarily premised on the availability of Supreme Court review of an offensive state court judgment.[4] Supreme Court review of Howell's disciplinary proceeding was impossible. Since Howell raised no federal claims in the Texas courts, due no doubt to the federal district court's assurance that he could return to federal court with his federal

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4. The unmentioned but obvious antecedent of *Sawyer* and *Kimball* is *Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 44 S.Ct. 149, 68 L.Ed. 362 (1923), the case that spawned the so-called *Rooker* doctrine. *Rooker* held that only the Supreme Court can entertain jurisdiction of a proceeding to reverse or modify a state court judgment. *Id.* at 415—16, 44 S.Ct. at 150, 68 L.Ed. at 365. A panel of this court recently disputed that *Rooker* still stands, if it ever stood, for that proposition. *See Gresham Park Community Org. v. Howell,* 652 F.2d 1227, 1233—36 (1981). One recent commentator, while conceding that *Rooker* has been subjected to narrowing constructions, argues for its continuing vitality. *See* Chang, *Rediscovering the Rooker Doctrine: Section 1983, Res Judicata and the Federal Courts,* 31 Hastings L.J. 1337, 1344 & n.46, 1375—77 (1980). *But see Developments in the Law—Section 1983 and Federalism,* 90 Harv.L.Rev. 1133, 1334 n.14 (1977).

claims, Supreme Court review was unavailable. Our holding that the unavailability of Supreme Court review distinguishes this case from *Sawyer* and *Kimball* and obliges the district court to assume jurisdiction of Howell's action is mandated by a recent decision of this court.

In *Dasher v. Supreme Court of Texas,* 658 F.2d 1045 (5th Cir. 1981), the plaintiff brought a civil rights action in federal court challenging the Texas Supreme Court's decision not to admit her to the Texas bar as violative of the United States Constitution. The plaintiff had not raised any federal constitutional claims before the Texas Supreme Court, thus, rendering the state court's decision unreviewable by the United States Supreme Court under 28 U.S.C. § 1257(3).[5] This court noted that the availability of Supreme Court review "has served as a predicate for numerous decisions in the lower federal courts holding that district courts have no jurisdiction to review, under the guise of a § 1983 suit, state court decisions in cases involving individuals' applications for admission to the state's bar." *Dasher,* 658 F.2d at 1049—50. The court held that the plaintiff's suit was within the district court's jurisdiction since her federal claims were not presented in the state court and thus review was not available in the Supreme Court. *Id.* at 1051.[6]

Howell withheld his federal constitutional arguments from the state courts after the federal district court relegated him to the state system with a promise that he could return with his federal claims pursuant to *England v. Louisiana State Board of Medical Examiners,* 375 U.S. 411, 84 S.Ct. 461, 11 L.Ed.2d 440 (1964).

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5. 28 U.S.C. § 1257(3) provides, in part, that "[f]inal judgments . . . rendered by the highest court of a State . . . may be reviewed by the Supreme Court . . . where any title, right, privilege or immunity is specially set up or claimed under the Constitution."

6. The undropped shoe in *Dasher* is res judicata. The opinion does not mention res judicata and we presume that it was not pleaded in the district court as an affirmative defense. Thus, we note that in the ordinary case res judicata would apply where state and federal legal theories are "split" between two forums.

The district court held out that promise erroneously, since the *England* reservation mechanism is an incident of *Pullman* abstention.[7] The district court more properly should have dismissed Howell's action and relegated him to the state courts to present all of his claims. Instead, the district court's citation to *England* assured Howell that he could present his state claims in state court and then, if necessary, return to federal court with his federal claims. As a result, the Texas disbarment action could not have been reviewed by the United States Supreme Court. Thus, *Dasher* establishes that the district court has jurisdiction over Howell's federal claims.

III

The State Bar, as an alternative argument for affirmance, claims that res judicata forbids litigation of claims in federal court that might have been litigated in state court. While we agree that in the normal case res judicata would apply, the facts of this case once again fall outside of the general rule.

Allen v. McCurry, 449 U.S. 90, 101 S.Ct. 411, 66 L.Ed.2d 308 (1980), has settled most of the ground rules with respect to the preclusive effect of a state court judgment in a subsequent civil rights action in federal court. Traditional rules of preclusion are generally applicable in the cross-forum context. However, rules of preclusion and the mandate of 28 U.S.C. § 1738[8] can still be suspended under the *England* reservation mechanism or when the federal party against whom preclusion is asserted did not have a full and fair opportunity to litigate his federal claims in state court. *Id.* at 101 & n.17, 101 S.Ct. at 418 & n.17, 66 L.Ed.2d at 317 & n.17; *see also Montana v. United States*, 440 U.S. 147, 163—64, 99 S.Ct. 970, 978—79, 59 L.Ed.2d 210, 223 (1979). Although both *McCurry* and *Montana* involved collateral estoppel, we are confi-

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7. *Railroad Comm'n v. Pullman Co.*, 312 U.S. 496, 61 S.Ct. 643, 85 L.Ed. 971 (1941).

8. 28 U.S.C. § 1738, the Full Faith and Credit Act, provides that the "judicial proceedings of any court of any . . . State. . . . shall have the same full faith and credit in every court within the United States . . . as they have by law or usage in the courts of [the] State. . . . from which they are taken."

dent that the same exceptions apply to suspend application of res judicata in federal civil rights action. We hold that a hybrid of the *England* and full-and-fair-opportunity exceptions requires that res judicata not apply in this case. This decision is based on federal law exception to both res judicata and the normal rule that a state court judgment's preclusive effect is determined by reference to the law of the judgment-rendering state.

We have already noted that the district court's promise to Howell that *England* offered a road back to federal court was not supported by the law. Nonetheless, that promise induced Howell to hold back his federal claims once he was relegated to state court. As a result, he could hardly be said to have had a full and fair opportunity to present his federal claims in state court even though such an opportunity was in theory present. Had Howell lodged his federal claims in state court, he would have forsaken the chance he had been offered to return to federal court. We are unwilling to punish Howell for his reliance on the federal district court's guidance.[9] His federal claims are not barred by res judicata.

IV

In sum, there is neither a jurisdictional nor a preclusive bar to Howell's presentation of his federal claims in federal court. Insofar as those bars have fallen, we reverse the district court's order of dismissal and remand this case to the district court for disposition on the merits.

REVERSED and REMANDED.

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9. This opinion should not be construed as an endorsement of the type of "simple justice" or "public policy" exception to res judicata that the Supreme Court spurned in *Federated Dep't Stores v. Moitie*, 452 U.S. 394, 399, 101 S.Ct. 2424, 2428, 69 L.Ed.2d 103, 110—11 (1981). The court in *Moitie* found *Reed v. Allen*, 286 U.S. 191, 52 S.Ct. 532, 76 L.Ed. 1054 (1932), to be controlling. In *Reed*, the court noted that the party trying to escape res judicata was in a "predicament . . . of his own making." *Id.* at 198, 52 S.Ct. at 533, 76 L.Ed. at 1056. On the contrary, Howell's predicament resulted from the district court's faulty ruling. Rather than carve out a "simple justice" exception to res judicata, we rely on a hybrid of the two exceptions (*England* and full-and-fair-opportunity) expressly noted in *McCurry* and *Montana*.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 81-1069

CHARLES BEN HOWELL,
Plaintiff-Appellant,

versus

STATE BAR OF TEXAS, Et Al.,
Defendants-Appellees.

Appeal from the United States District Court for the
Northern District of Texas

ON PETITION FOR REHEARING
(May 27, 1982)

Before CLARK, Chief Judge, THORNBERRY and GARZA, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:

/S/ Charles Clark
CHIEF JUDGE

[Filed May 27, 1982]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

CHARLES BEN HOWELL	)	
vs.	)	**CA 3-76-0280-C**
STATE BAR OF TEXAS	)	
JOHN M. LAWRENCE, III	)	
GRANT DAVIS,	)	
ROBIN P. HARTMAN	)	

ORDER

Plaintiff's Motion for Preliminary Injunction was brought before the Court on March 1, 1976. After having heard and considered the affidavits of plaintiff and the oral and written argument of counsel, this Court is of the opinion that the preliminary injunction should be denied. *Huffman v. Pursue, Ltd.*, 420 U.S. 592 (1974), *Younger v. Harris*, 401 U.S. 37 (1971). Plaintiff of course has the right to raise federal constitutional issues in federal court, should that prove necessary after the state court proceeding is completed. *England v. Board of Medical Examiners*, 375 U.S. 411 (1964).

It is therefore ORDERED, ADJUDGED and DECREED that Plaintiff's Motion for Preliminary Injunction be and hereby is denied.

/S/ W.M. Taylor, Jr.
UNITED STATES DISTRICT JUDGE

March 4, 1976
Date

[Filed March 4, 1976]

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF TEXAS

DALLAS 75242

W. M. TAYLOR, JR.
U.S. DISTRICT JUDGE

July 24, 1980

TO COUNSEL OF RECORD

Re: Charles Ben Howell
vs.
State Bar of Texas,
et al. CA 3-76-0280-C

Gentlemen:

I have concluded that the State Bar's Motion to Dismiss should be granted.

It is clear to me that *Polk v. State Bar of Texas,* 480 F.2d 998 (5th Cir. 1973) is inapplicable. Not only because of footnote 11, but because it did not involve an attack on a state court judgment. I also do not believe that *England v. Medical Examiners,* 375 U.S. 411 (1968), is applicable. Plaintiffs there were told to file a lawsuit in state court for an authoritative construction of a state statute so that a constitutional claim would not be decided if the statute were construed in Plaintiff's favor. Plaintiff here was not the Plaintiff in the state court suit here and was not seeking the construction of a state statute. He was the Defendant in a case in which the Plaintiff there won an affirmative judgment against him. His constitutional claims were more of the nature of a compulsory defense in that suit. See *Moore v. Sims,* 442 U.S. 415 (1979).

Defendant's counsel is requested to prepare an appropriate form of order.

Yours very truly,

/S/ W.M. Taylor, Jr.
W.M. TAYLOR, JR.

IN THE UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

CHARLES BEN HOWELL	**X**	
V.	**X**	**CIVIL ACTION NO.**
THE STATE BAR OF TEXAS,	**X**	**CA-3-76-0280-C**
FRANKLIN JONES, JR., AND	**X**	
JERRY L. ZUNKER	**X**	

ORDER

The above-styled and numbered cause having come before the Court regularly to be heard and considered upon the briefs submitted to the Court and the argument of counsel for the parties upon the motion of the Defendants to dismiss; and it appearing to the court that such motion should be granted, it is accordingly

ORDERED that the Defendant's Motion to Dismiss Pursuant to Rule 12 be, and it is hereby granted, as to all Defendants and the Plaintiff's complaint is dismissed.

It is further ORDERED that the preliminary injunction heretofore entered by this Court on July 10, 1978, be, and the same is dissolved.

Signed this 22nd day of Dec., 1980.

/S/ W.M. Taylor Jr.
United States District Judge

[Filed December 22, 1980]

CHARLES BEN HOWELL, Appellant,

v.

The STATE of Texas, Appellee.

No. 1060.

Court of Civil Appeals of Texas,
Tyler.

Nov. 23, 1977.

Rehearing Denied Dec. 29, 1977.
[559 S.W.2d 432]

Tom S. McCorkle, Jr., Dallas, Waggoner Carr, Austin, Melvyn Carson Bruder, Dallas, for appellant.

Robert C. Bass, Jr., Asst. Gen. Counsel, Austin, for appellee.

McKAY, Justice

This is a disbarment suit brought by the State of Texas, acting by and through its Grievance Committee for the Sixth District of the State Bar of Texas, appellee, against Charles Ben Howell, appellant, alleging that certain acts and conduct of appellant constituted malpractice, fraudulent and dishonorable conduct in willful violation of the Code of Professional Responsibility which warranted the disciplining of appellant under the State Bar rules. The prayer of appellee asked that appellant be disbarred, suspended or reprimanded. Trial was had before a jury, and the trial court disregarded part of the verdict and rendered judgment that appellant was guilty of professional misconduct in engaging in conduct prejuditial to the administration of justice, and that appellant be reprimanded. Appellant has perfected his appeal.

Appellant is a duly licensed attorney of the State of Texas and a member of the State Bar of Texas. It was alleged in appellee's pleadings that appellant appeared before Judge Dee Brown

Walker, 162nd District Court, sitting for the Judge of Domestic Relations Court No. 2, Dallas County, and presented Judge Walker with the file of a bill of review and divorce proceeding from Domestic Relations Court No. 2 and moved for a default judgment on the grounds that no answer had been filed. It was further alleged that appellant did not tell Judge Walker that there was another case pending between the same parties for a divorce in Domestic Relations Court No. 3, and that Judge Dan Gibbs of that court had set a hearing on both cases for the following week, and that appellant had appeared before Judge Gibbs only two days before concerning both cases. Judge Walker rendered a default judgment awarding custody of the minor children. When Judge Walker learned of the facts concerning the case pending in Domestic Relations Court No. 3 he cited appellant for contempt and transferred the matter for a hearing before another judge.

Appellant later appeared before Judge Louis Holland, a retired district judge sitting in Domestic Relations Court No. 3, to determine whether appellant was guilty of contempt of court before Judge Walker. During the hearing appellant became a witness in support of his motion for continuance, and he testified that he had attempted to employ four different lawyers to represent him, and each of them had refused due to alleged fear of prejudice in future cases before Judge Walker. The assistant district attorney representing appellee asked appellant to name the four lawyers he contacted, and appellant refused to do so. Judge Holland then instructed appellant to answer the question and name the lawyers and appellant refused to do so, asked that his motion for continuance be withdrawn, and persisted in his refusal after being advised that he would be held in contempt of court. Judge Holland then ruled that appellant was in contempt of court. [See *Ex parte Howell*, 488 S.W.2d 123 (Tex.Cr.App.1973) for factual statement.]

The present suit is an outgrowth of the contempt matters before Judge Walker and Judge Holland. The trial court submitted the

case to a jury on ten special issues.[1] We are concerned in this appeal with issues 9 and 10. In issue 9 the jury found appellant failed to answer a question relating to his motion for continuance when he was instructed by Judge Holland to answer, and failed to find in issue 10 that such conduct was prejudicial to the administration of justice. Upon motion of appellee the trial judge set aside the jury's answer to issue 10 and disregarded same, holding that issue 10 was a question of law which should be decided by the court. In its judgment the trial court held that, based upon the jury's answer to issue 9, in its opinion appellant was guilty of professional misconduct "in that he did engage in conduct that was prejudicial to the administration of justice." It was further ordered that appellant be reprimanded for his professional misconduct.

1. "SPECIAL ISSUE NO. 1

"Do you find from a preponderance of the evidence that on or about the 26th day of May, 1971, at the time he obtained a default judgment in an action pending in Domestic Relations Court Number 2 involving divorce, property, and custody of minor children, Charles Ben Howell did not tell Judge Walker that another action involving the same parties regarding divorce, property, and custody of minor children was pending in Domestic Relations Court Number 3?

"Answer 'yes' or 'no'.

"ANSWER 'No'.

[Issues 2, 3, 4, 6, 7 and 8 not answered according to instructions]

"SPECIAL ISSUE NO. 9

"Do you find from a preponderance of the evidence that Charles Ben Howell failed to answer a question relating to his motion for continuance when he was instructed by Judge Holland to answer?

"Answer 'yes' or 'no'.

"ANSWER 'yes.'

"If you have answered Special Issue No. 9 'yes', and only in that event, you will answer the following Special Issue:

"SPECIAL ISSUE NO. 10

"Do you find from a preponderance of the evidence that when Charles Ben Howell failed to answer a question relating to his motion for continuance which he was instructed by Judge Holland to answer, if you have so found, that he engaged in conduct that was prejudicial to the administration of justice?

"Answer 'yes' or 'no'.

"ANSWER 'no'."

By his first three points appellant contends that the trial court erred in that appellant was denied due process of law, equal protection of law, and the right of trial by jury because (1) the facts do not indisputably establish the jury verdict to be so clearly wrong that reasonable minds cannot agree to the contrary; (2) the question as to whether the conduct of appellant was prejudicial to the administration of justice is not one of law to be decided by the court only; and (3) the trial court has no power to revise a jury verdict in a punitive or quasi-criminal case. The basic question raised by appellant in these points is whether a finding that conduct is prejudicial to the administration of justice is a fact issue for the jury or a question of law for the court. We hold that it is a function of the court and that the trial court properly disregarded the answer of the jury to issue 10.

Article 12, Sec. 28, State Bar Rules, V.T. C.S., provides in part:

> "If the court shall find from the evidence in a case tried without a jury, or from the verdict of the jury, if there be one, that the defendant is guilty of no professional misconduct, he shall enter judgment so declaring and dismiss the complaint; but if he shall find the defendant guilty, he shall determine whether the party shall be (a) reprimanded, or (b) suspended from practice (in which case he shall fix the term of suspension), or (c) disbarred; and he shall enter judgment accordingly."

As we view Sec. 28 the function of the trial court is (1) to make the actual determination whether the conduct of an attorney constitutes professional misconduct; and if it finds it was professional misconduct, (2) exercise its disciplinary authority. Article 12, Sec. 9, State Bar Rules, V.T.C.S., provides in part that:

> "a. Professional misconduct consists of any of the following:
> "(1) Misconduct as specified in DR1—102, Code of Professional Responsibility . . . ."

Article 12, Sec. 8, DR1—102, provides in part:

> "(A) A lawyer shall not:
>
> • • • • •
>
> "(5) Engage in conduct that is prejudicial to the administration of justice."

The jury found (Issue 9) that appellant refused to answer the question as to the identity of the attorneys he contacted to represent him in his contempt hearing before Judge Holland after being instructed to do so by the court. Issue 10 asks whether such conduct was prejudicial to the administration of justice, to which the jury answered "no." There were no definitions or explanations in the charge (and none requested) to guide the jury in its answers. Appellant argues that *State v. Baker,* 539 S.W.2d 367 (Tex.Civ.App.—Austin 1976, writ ref'd n.r.e.), is authority for submitting issue 10 to the jury. We disagree. The opinion (Page 371) states that such an issue was submitted to the jury, but nowhere does it approve or disapprove of such issue as being proper.

Appellant's contention that the trial court has no power to revise a jury verdict in a punitive or quasi-criminal case is without merit. The trial here was a civil suit, and the trial court was authorized to disregard on its own motion any issue that was immaterial or one which constituted a question of law. Art. 12, Sec. 21, State Bar Rules; *C & R Transport, Inc. v. Campbell,* 406 S.W.2d 191 (Tex.1966); *Grubb v. Grubb,* 525 S.W.2d 38 (Tex.Civ.App.—El Paso 1975, writ ref'd n.r.e.). The case of *Archer v. State,* 548 S.W.2d 71 (Tex.Civ.App.—El Paso 1977, writ ref'd n.r.e.), a disbarment suit, has the following language:

> "Appellant contends that the Court's act of disregarding the jury's answer to Special Issue No. 1(a) violated his right of trial by jury as provided in the Code. The provision of the Code is that the accused attorney shall have the right of a trial by jury in the county of his residence. It cannot be given the construction that Appellant places on it, for the Code also says that the Rules of Civil Procedure shall govern, and, under those rules, the Court can disregard an issue. Appellant's contention has been decided otherwise in the case of *State v. Baker,* supra. It was there held that the trial Court erred in not granting the State's motion for judgment non obstante veredicto."

Points 1—A, 1—B, and 1—C are overruled.

By his next three points appellant maintains that Article 12, sec. 8, DR1—102(A)(5), State Bar Rules, is vague and indefinite (1) on its face, (2) as construed by the courts of Texas, and (3) as construed and applied in this case, and is unconstitutional because it violates the due process and equal protection clauses of the Constitution of Texas. We disagree. It is undisputed in the record that appellant, in the capacity of a witness, refused to answer a question after instructed to do so by the trial court and after being advised that his failure to do so would result in appellant being in contempt of court. Was such conduct on the part of appellant "prejudicial to the administration of justice"? In our opinion it was. "Prejudicial" has been defined as tending to injure or impair; detrimental; harmful; hurtful; injurious. 33 Words and Phrases, page 471; Webster's Seventh New Collegiate Dictionary, G & C Merriam Co. 1969. "Administration of justice" has been described thusly: "The administration of justice consists in the trial of cases in the court, and their judicial determination and disposition by orderly procedure, under rules of law, and putting of the judgment into effect." *Massey v. City of Macon,* 97 Ga.App. 790, 794, 104 S.E.2d 518, 521—522 (1958).

We do not believe that the language "a lawyer shall not: . . . engage in conduct that is prejudicial to the administration of justice" is so vague and indefinite that it violates the due process and equal protection clauses of the Constitution of Texas. Conduct prejudicial to the administration of justice may consist of any one or more of many acts too numerous to list. See 7 C.J.S. Attorney and Client sec. 23, p. 741, et seq. However, although the State Bar rule may be in general terms, in our opinion conduct which falls within the above definitions is prejudicial to the administration of justice and is professional misconduct.

The Supreme Court of Kansas has written on the question as to whether State Bar Rule DR1—102(A)(5) is vague in *State v. Nelson,* 210 Kan. 637, 639, 504 P.2d 211, 214 (1972):

> "With respect to issue 3, respondent argues that the word 'prejudicial' as it appears in DR1—102(A)(5) is unconstitutionally vague and casts a 'chilling effect on First Amendment freedoms'. Respondent's position is unsupported in both in-

stances. The word 'prejudicial' is universally found throughout the legal and judicial system. Specific definitions are found in any dictionary. In *Prunty v. Light Company,* 82 Kan. 541, 108 P. 802, this court, referring to Webster's Universal Dictionary, defined prejudicial as 'hurtful', 'injurious', 'disadvantageous'. It cannot be seriously contended that 'prejudicial' does not sufficiently define the degree of conduct which is expected of an attorney."

The Supreme Court of Oregon has also addressed the question in *Complaint of Rook,* 276 Or. 695, 556 P.2d 1351, 1357 (1976):

"As for the contention by the accused that the terms of DR1—102(A)(5) are unconstitutionally vague, we believe that as standards of professional conduct they are sufficiently definite for the purpose of a professional disciplinary proceeding. . . .We have previously held that such a proceeding is not a criminal proceeding, and that the technicalities of criminal law, which are properly invoked to safeguard the liberty of citizens, are not necessarily relevant in the investigation of unethical conduct by an attorney. . . ."

We conclude that the conduct of appellant was injurious, hurtful and detrimental to the orderly trial of the case before the court, and such conduct was prejudicial to the administration of justice. These points are overruled.

In his next three points appellant contends that the trial court erred in overruling his plea to the juridiction and his alternative plea alleging lack of a competent plaintiff because members of the Grievance Committee were at all material times unsworn, never having taken the oath of office as provided in Article 16, sec. 1, Constitution of Texas. Appellant also filed a motion to dismiss and a motion for directed verdict on the same grounds. The provision in Article 16, sec. 1 of the Texas Constitution reads in part:

"The Secretary of State, and all other appointed officers, before they enter upon the duties of their offices, shall take the following Oath and Affirmation: . . ."

The Legislature by Article 320a—1, V.T. C.S., sec. 4, subdivision (a), provided that

> "From time to time as the court may seem proper, the Supreme Court of Texas shall prepare and propose rules and regulations for disciplining, suspending, and disbarring attorneys at law; . . ."

Pursuant to the specific legislative grant of power the Supreme Court, in Article 12, State Bar Rules, promulgated rules for disciplining members of the State Bar of Texas, and such rules include the establishing of grievance committees and the appointing of members to those committees.

The "office" of a grievance committee member is created by rule promulgated by the Supreme Court of Texas pursuant to a specific statutory act. It was not created by the Constitution of Texas, and the constitutional oath required of officers appointed pursuant to a specific or implied constitutional grant is not required. In *Lopez v. State,* 437 S.W.2d 268 (Tex.Crim. App.1969), it was held that a special prosecutor was not required to take the constitutional oath of office before appearing in the case. It is specifically pointed out in *State v. Sewell,* 487 S.W.2d 716, 719 (Tex.1972), that "the Grievance Committee is an administrative agency of the Judicial Department and is the arm of the Supreme Court in the discharge of its professional policing duties." Before becoming a licensed attorney every person admitted to practice law takes an oath, Article 309, V.T.C.S., and we hold that when a member of the State Bar of Texas is appointed to a Grievance Committee, such attorney is not required to take the constitutional oath of office. See *Smith v. Grievance Committee,* 475 S.W.2d 396, 399 (Tex.Civ. App.—Corpus Christi 1972, no writ). These points are overruled.

In his last three points appellant maintains that the trial court erred in overruling his plea to the jurisdiction because the Grievance Committee decision to proceed by a formal complaint was not made by a majority vote of the Grievance Committee; that the trial court erred in in sustaining appellee's special exception to appellant's pleading under oath that the Grievance Committee members failing to attend a grievance hearing were dis-

qualified to vote, thus causing a less than majority vote to proceed by formal complaint; and that the court erred in not dismissing the case or directing the verdict for appellant when appellant pleaded under oath that there was no majority vote by the Grievance Committee to institute a formal complaint, and appellee rested its case without controverting appellant's sworn allegation.

Appellant argues that the trial court was without jurisdiction because less than a majority of the Grievance Committee was present when a vote was taken to file a formal complaint against appellant. The record reflects that the Grievance Committee had twelve members, and at a meeting on September 7, 1972, there were eight members present. No decision was made or action taken at that meeting. Thereafter, on January 18, 1973, there were ten members of the committee present at the meeting, and the minutes of that meeting read:

> "*CHARLES BEN HOWELL*—The committee voted a six-month's suspension in connection with Mr. Howell's contempt of court matter. Only the members present at the time of the hearing voted on this. Larry Beason did not vote. Mr. Burleson is to advise Mr. Howell of this decision. If he does not accept, the committee voted to proceed with filing suit for suspension or disbarment.

Of the ten members present on January 18, 1973, six of those were present at the meeting on September 7, 1972.

Article 12, sec. 5 of the State Bar Rules provides:

> ". . . A majority of the [grievance] committee shall constitute a quorum for all purposes."

The record shows that there were seven or more members present on September 7, 1972, and on January 18, 1973, and seven members constituted a quorum. A majority of the quorum was authorized to act. "Majority" means the greater number, or the number greater than half of any total. Black's Law Dictionary, Fourth Ed. Appellant argues that there had to be a majority of the members of the committee voting for the bringing of this suit

before such action could be taken. We disagree. If a majority of the committee was present, which majority constituted a quorum, then a majority of the quorum could act. There being ten members present at the January 18, 1973, meeting, only six were required to vote for the filing of the present suit. When a majority constitutes a quorum of a deliberative body, it can take any action the body has power to transact. *Herring v. City of Mexia,* 290 S.W. 792 (Tex.Civ. App.—Waco 1926, writ ref'd). These points are overruled.

Judgment of the trial court is affirmed.

NO. 74-9611-E

STATE OF TEXAS	§	**IN THE DISTRICT COURT**
V.	§	**OF DALLAS COUNTY, TEXAS**
CHARLES BEN HOWELL	§	**101ST JUDICIAL DISTRICT**

NOTICE

Comes now the defendant, Charles Ben Howell, who gives notice that on February 19, 1976, this defendant filed a complaint in the United States District Court, Northern District of Texas, Dallas Division, cause No. CA3-76-0280-C entitled Charles Ben Howell, Plaintiff, v. State Bar of Texas, et al, defendants. A true copy of the said complaint is attached hereto.

Respectfully submitted,

_____

CHARLES BEN HOWELL

226 Lakewood Tower Bldg.
Dallas, Texas 75214
Tel. No. 823-8400

ATTORNEY PRO SE

A copy of the foregoing has been provided to opposing counsel in accordance with the Texas Rules of Civil Procedure.

[A copy of Howell's complaint was attached hereto]

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

CHARLES BEN HOWELL,	§	**CAUSE NO.**
v.	§	**CA 3-76-0280-6**
STATE BAR OF TEXAS,	§	
JOHN M. LAWRENCE, III,	§	
DAVIS GRANT,	§	
and ROBIN P. HARTMANN,	§	
Defendants		

COMPLAINT

JURISDICTION:

1.

This is an action seeking a declaratory judgment that certain disbarment proceedings being prosecuted by and on behalf of defendants and against this plaintiff are being so prosecuted in violation of plaintiff's rights guaranteed by the Constitution and laws of the United States. Plaintiff includes an alternative plea for injunctive relief. This action is brought under the provisions of 42 U.S.C. §§ 1983-1985, et seq. The District Courts of the United States have jurisdection over this cause of action under the provisions of 28 U.S.C. §§ 1331, 1343, 1344, 1355 and 1357.

[Paragraphs 2-17 Deleted]

FEDERAL DEPRIVATIONS:

18.

The aforesaid disbarment action pending in the State Court of Texas is being prosecuted in violation of plaintiff's rights guaranteed to him by the Due Process Clause, the Equal Protection Clause and the Privileges and Immunities Clause of the Fourteenth Amendment to the United States Constitution. Such action further deprives and threatens to deprive plaintiff of rights,

privileges and immunities secured by the Constitution and laws of the United States.

19.

The aforesaid disbarment action now pending in the State Court of Texas is, according to the allegations thereof, being prosecuted under the procedure specified in Article XII of the rules governing the State Bar of Texas, specifically sections 21-31 of subheading C thereunder. In addition, defendants allege in their State Court action that plaintiff Howell is guilty of professional misconduct through willful violation of the code of professional responsibility as adopted in Texas, thereby invoking and relying upon sections 8 and 9 of said Article XII.

20.

The said rules upon their face are void as repugnant to the Due Process, the Equal Protection and the Privileges and Immunities Clauses of the Fourteenth Amendment to the United States Constitution. Alternatively, the said rules, as they have been definitively construed by the Courts of the State of Texas are so void and unconstitutional. In the further alternative, said rules, either aided or unaided by limiting constructions placed thereon by the Texas Courts are so void and unconstitutional insofar as they apply to the plaintiff Charles Ben Howell and the said disbarment proceedings. Such State Court action, insofar as it is based upon the aforesaid unconstitutional State Bar Rules, is being prosecuted in violation of the Constitution and laws of the United States.

21.

First Deprivation: Trial Before His Competitors: The aforesaid Grievance Committee, functioning as a quasi-judicial tribunal for the purpose of trying the complaints against this plaintiff in the first instance on or about September of 1972, was not a representative group of attorneys practicing law in Dallas County, Texas. To the contrary, such Committee was a stacked deck selected from and dominated by lawyers devoting the bulk of their time to

the representation of banks, insurance companies, large corporations and others in possession of the money and property of the community.

22.

Plaintiff is a general practitioner concentrating his practice upon the representation of persons occupying the bottom 95% of the economic and social barrel. As such, plaintiff, and other general-practitioner type lawyers in the same position as plaintiff, is required to earn his livelihood by appearing on the opposite side of the docket from the lawyers dominating the said Grievance Committee. General practitioners such as plaintiff have been, were and now are systematically excluded and systematically under-represented upon the said Grievance Committee. Plaintiff, was in effect, unconstitutionally tried before a tribunal composed of his competitors.

23.

Second Deprivation: Selective Prosecution: Plaintiff Howell has been singled out and selectively prosecuted on account of his political activities aforesaid. Each time that plaintiff has been a candidate for judicial office in Dallas County, Texas, plaintiff has opposed judicial candidates who had the overwhelming backing, sponsorship and endorsement of that segment of the Dallas County Bar serving the monied and propertied interests of the community and which type of practitioner dominated the tribunal conducting the September, 1972, grievance trial against petitioner.

24.

In support of his claim that he was singled out for selective prosecution, plaintiff would show that over the years, literally thousands of default judgments have been taken in the Dallas County Courthouse and elsewhere in the State of Texas. A large number of these defaults have been subsequently set aside on the grounds that the parties have made false statements or have omitted to make some disclosure or the other. However, no record can be found where any lawyer has ever been prosecuted before a Grievance Committee for the mode or manner in which he secured a default judgment.

25.

In support of his claim that he was singled out for selective prosecution, plaintiff would show that over the years, there have been many instances occurring in the Dallas County Courthouse and elsewhere in the State of Texas, wherein a lawyer has failed or refused to obey a direct order issued orally from the bench and relating to the conduct of a trial or similar legal proceedings then and there in progress. A large number of these lawyers have been fined and imprisoned or both for such disobedience. However, no record can be found where any lawyer has ever been prosecuted before a Grievance Committee for any such disobedience. All such cases are subject to the presumption that the punishment inflicted at the time of the offense is sufficient punishment for the violation of the Court's orders in such instances.

26.

In further support of his claim that he was singled out for selective prosecution, plaintiff would show that through the established and accepted usage of the grievance machinery over the years and through all of the published pronouncements thereon, the principle function of the Grievance Committee has been to exclude from the practice of law those lawyers who have demonstrated themselves to be insufficiently skilled and experienced, and to further exclude those lawyers who have demonstrated the tendency to betray the trust and confidence of a client. Even if entirely true, the allegations against plaintiff Howell do not tend to establish that he is insufficiently skilled and experienced. Neither do they establish any tendency to betray a client's trust and confidence. Thus, the said allegations are entirely outside the scope of the normal and usual grievance prosecution as conducted over the years in Dallas County, Texas.

27.

In further support of his claim that he was singled out for selective prosecution, plaintiff would show that the said Grievance Committee consistently refuses to entertain complaints or enter any type of disciplinary judgment or order against its own kind; that is, establishment-type lawyers representing the monied and propertied interests. In such instances, the said Grievance Com-

mittee has consistently passed by on the other side, even when the offending lawyer has been guilty of the most glaringly duplicitous, sometimes feloniously criminal conduct. On the other hand, the Grievance Committee has again and again singled out this plaintiff and other general practitioners, similarly situated, for prosecution for peripheral or trivial errors and mistakes.

28.

Third Deprivation: Prosecutorial Misconduct: The said Grievance Committee, at least with respect to the proceedings against this plaintiff, has assumed the combined functions of investigator or arresting officer, prosecutor and tribunal. In the course thereof, the said Grievance Committee has been guilty of gross prosecutorial misconduct. It has attempted to cover up and conceal the fraudulent action and professional misconduct of Judge Walker in attempting to coerce the institution, prosecution and outcome of these proceedings. It has failed and refused to institute proceedings against Judge Walker for his fraudulent action and professional miconduct in tampering with Court papers and his fraudulent action and professional misconduct in the giving of false and misleading testimony when directly questioned before the Grievance Committee itself at the said September, 1972, hearing. (See exhibit hereto quoting his testimony) It has failed and refused to take any action against the attorney representing the husband in the said Ralston case, Mr. Gerald R. Coplin, for his fraudulent action and professional misconduct in failing to properly represent his client and in making false and misleading statements when directly questioned regarding his activities in the premises. It has further failed and refused to institute any proceedings against Judge Walker's legal adviser, Whitley R. Sessions for his fraudulent action and professional misconduct in failing to disclose, even when directly questioned, that he had advised and assisted Judge Walker in the institution of contempt proceedings and grievance proceedings against plaintiff Howell, and his fraudulent action and professional misconduct in making derogatory statements regarding Judge Holland and in the giving of false testimony when directly questioned with respect thereto, both at the September, 1972, grievance hearing and the July, 1972, contempt hearing.

29.

As a part of its prosecutorial misconduct, the said grievance committee deliberately suppressed and withheld evidence favorable to the defense which your plaintiff could have used at the September, 1972, grievance hearing and should be entitled to use at the State Court disbarment suit now pending against plaintiff. In particular, plaintiff Howell refers to evidence of misconduct of the said Judge Walker and attorneys Coplin and Sessions, which evidence constitutes valuable cross-examination and impeachment material.

30.

Fourth Deprivation: Punitive Burden Upon Right of Appeal: The aforesaid conditional judgment, order or decision for a six month suspension subject to the proviso that when this plaintiff refused to accept the same as final and sought appellate review, then the defendants would and did in fact institute proceedings for complete and permanent disbarment, constitute a punitive burden on the right of appeal. The avenues of appeal must be kept free of unreasoned distinctions. Even though Texas law provides that disbarment proceedings shall be tried according to civil rules of procedure, the inherent substantive nature of such proceedings is quasi-criminal. The respondant in a disciplinary proceedings may not be placed in apprehension that if he is unsuccessful in his demand for appellate review of his conviction, he may be handed a stiffer and more onerous sentence. Insofar as the aforesaid State Bar rules provide for or permit such procedures, they are unconstitutional and void.

31.

Fifth Deprivation: Punitive Burden upon the Right to Choose an Occupation: This plaintiff is possessed of the Constitutionally guaranteed right to pursue any honorable and worthwhile occupation or calling which he may choose. This right is only limited by the public right to be protected from those who are insufficiently skilled and experienced or from those who have demonstrated a tendency to betray the client's trust and confidence. No conduct has been alleged against this plaintiff that would create a sufficient

protection right of the public to override the personal right of the plaintiff to follow his chosen occupation.

32.

Plaintiff alleges that the State Bar rules do not provide and have not been construed as providing for exclusion from practice without regard to the balancing of the public interest against the personal interest as aforesaid, when specific and intelligible rules and regulations for the conduct of the practice of law are violated. Plaintiff alternatively alleges that any such provisions and constructions do not meet Constitutional standards and the same are void. Plaintiff further alleges that such question is not material to this case for reason that the State Court disbarment proceedings against this plaintiff do not charge plaintiff with the violation of any specific and intelligible statute, rule or regulation governing the practice of law by a licensed attorney.

33.

Sixth Deprivation: Vagueness and Overbreadth: The State Bar rules under which this plaintiff is being prosecuted are unconstitutionally vague in that men of ordinary intelligence and understanding must guess at their meaning and reasonable persons can easily differ in opinion as to whether or not certain conduct may or may not be proscribed. Such rules purport to place limitations upon what a lawyer may or may not do in order to advance the interest of his client. Licensed attorneys are subject to the continuing apprehension that their conduct on behalf of their clients may be retrospectively declared by the Grievance Committee to constitute professional misconduct, and they are thereby inhibited from exercising zealous advocacy on behalf of their clients. The said rules are possessed of such overbreadth as to exercise a chilling effect upon the right of petition guaranteed by the First Amendment to the United States Constitution. The said rules are void for vagueness in violation of the Due Process Clause of the Fourteenth Amendment and are further void on grounds that they are tainted with First Amendment overbreadth.

34.

In the alternative, plaintiff alleges the State Bar rules are unconstitutional as applied to the claim that the taking of a default judgment around May of 1971 constituted a violation thereof. In securing this default judgment, plaintiff violated no specific and intelligible statute, rule or regulation. Neither was his conduct of a clearly opprobrious nature. The misconduct, if any, was of a borderline nature and may not be punished under the said State Bar rules.

35.

Seventh Deprivation: Attempts to Punish Misconduct of a Non-Professional Nature: Any misconduct of which plaintiff Howell may have been guilty in failing and refusing to reveal the names of attorneys consulted by him was not of a professional nature and plaintiff Howell may not be prosecuted for professional misconduct because of the same. The officers of the State Bar of Texas are governmental officers of the State of Texas and the sheriff of Dallas County, Texas, is likewise a governmental officer of the State of Texas. The State grievance machinery and the State criminal justice system are not dual sovereignties and the acts of one are binding upon the other.

36.

On or about October of 1972, plaintiff Howell appeared before the Court of Criminal Appeals of Texas to prosecute a petition for habeas corpus endeavoring to secure release from the custody of the sheriff of Dallas County, Texas, upon a conviction for failing and refusing to disclose to Judge Holland the names of the attorneys consulted by plaintiff Howell. The Assistant District Attorney of Dallas County, Texas, also a governmental officer of the State of Texas, appeared in the said proceedings and urged on behalf of the respondent State officer that in refusing to make the requested disclosures, plaintiff Howell was acting in a private, personal and non-professional capacity. Such claim was received and adopted by the said Court and the election by the Sheriff and District Attorney to so contend in that proceeding, is binding

upon all officers and instrumentalities of the State of Texas. The Due Process and Equal Protection Clauses prohibit the officers of the same sovereignty from making conflicting claims in a different action against the same party while litigating essentially the same event.

[Paragraph 37 and Prayer Deleted]

[Filed February 19, 1976]

NO. 74-9611

THE STATE OF TEXAS	IN THE DISTRICT COURT
V.	DALLAS COUNTY, TEXAS
CHARLES BEN HOWELL	101ST JUDICIAL DISTRICT

DEFENDANT'S FIRST ORIGINAL AMENDED ANSWER

COMES NOW Charles Ben Howell, Defendant in the above styled and numbered cause, and subject to his motion to show authority, his plea in abatement and his alternative motion for severance herein filed, files this his First Original Amended Answer to the Plaintiff's First Amended Petition filed herein, and respectfully represents and shows the Court as follows:

[Paragraphs 1-19 Deleted]

XX.

Defendant hereby expressly excepts and reserves for litigation in the federal courts of the United States all rights, privileges and immunities provided to him under the Constitution and Laws of the United States. Wherever Defendant uses, in this pleading or elsewhere in the course of this State Court case the terms "due process", "equal protection of the law", "constitutional rights", or otherwise invokes any constitutional provision or protection, the same shall be deemed to refer to only the Constitution of the State of Texas of 1876 and Amendments thereto.

[Paragraphs 21 and 22 Deleted]

[Filed March 22, 1976]

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

CHARLES BEN HOWELL,
Plaintiff

V.

STATE BAR OF TEXAS,	§	**CAUSE NO.**
JOHN M. LAWRENCE, III,	§	**CA 3-76-0280-6**
DAVIS GRANT,	§	
and ROBIN P. HARTMANN,	§	

Defendants

AMENDED
COMPLAINT

JURISDICTION:

1.

This is an action seeking a declaratory judgment that certain disbarment proceedings being prosecuted by and on behalf of defendants and against this plaintiff are being so prosecuted in violation of plaintiff's rights guaranteed by the Constitution and laws of the United States. Plaintiff includes an alternative plea for injunctive relief. This action is brought under the provisions of 42 U.S.C. §§ 1983-1985, et seq. The District Courts of the United States have jurisdection over this cause of action under the provisions of 28 U.S.C. §§ 1331, 1343, 1344, 1355 and 1357.

2.

This cause of action arose within the territorial boundaries of the United States District Court for the Northern District of Texas, Dallas Division.

[Paragraphs 3-17 Deleted]

FEDERAL DEPRIVATIONS:

18.

The aforesaid disbarment action pending in the State Court of Texas is being prosecuted in violation of plaintiff's rights guaranteed to him by the Due Process Clause, the Equal Protection Clause and the Privileges and Immunities Clause of the Fourteenth Amendment to the United States Constitution. Such action futher deprives and threatens to deprive plaintiff of rights, privileges and immunities secured by the Constitution and laws of the United States.

19.

The aforesaid disbarment action now pending in the State Court of Texas is, according to the allegations thereof, being prosecuted under the procedure specified in Article XII of the rules governing the State Bar of Texas, specifically sections 21-31 of subheading C thereunder. In addition, defendants allege in their State Court action that plaintiff Howell is guilty of professional misconduct through willful violation of the code of professional responsibility as adopted in Texas, thereby invoking and relying upon sections 8 and 9 of said Article XII.

20.

The said rules upon their face are void as repugnant to the Due Process, the Equal Protection and the Privileges and Immunities Clauses of the Fourteenth Amendment to the United States Constitution. Alternatively, the said rules, as they have been definitively construed by the Courts of the State of Texas are so void and unconstitutional. In the further alternative, said rules, either aided or unaided by limiting constructions placed thereon by the Texas Courts are so void and unconstitutional insofar as they apply to the plaintiff Charles Ben Howell and the said disbarment proceedings. Such State Court action, insofar as it is based upon the aforesaid unconstitutional State Bar Rules, is being prosecuted in violation of the Constitution and laws of the United States.

21.

1st Deprivation: Trial Before His Competitors: The aforesaid Grievance Committee, functioning as a quasi-judicial tribunal for the purpose of trying the complaints against this plaintiff in the first instance on or about September of 1972, was not a representative group of attorneys practicing law in Dallas County, Texas. To the contrary, such Committee was a stacked deck selected from and dominated by lawyers devoting the bulk of their time to the representation of banks, insurance companies, large corporations and others in possession of the money and property of the community.

22.

Plaintiff is a general practitioner concentrating his practice upon the representation of persons occupying the bottom 95% of the economic and social barrel. As such, plaintiff, and other general-practitioner type lawyers in the same position as plaintiff, is required to earn his livelihood by appearing on the opposite side of the docket from the lawyers dominating the said Grievance Committee. General practitioners such as plaintiff have been, were and now are systematically excluded and systematically under-represented upon the said Grievance Committee. Plaintiff was, in effect, unconstitutionally tried before a tribunal composed of his competitors.

23

2nd Deprivation: Selective Prosecution: Plaintiff Howell has been singled out and selectively prosecuted on account of his political activities aforesaid. Each time that plaintiff has been a candidate for judicial office in Dallas County, Texas, plaintiff has opposed judicial candidates who had the overwhelming backing, sponsorship and endorsement of that segment of the Dallas County Bar serving the monied and propertied interests of the community and which type of practitioner dominated the tribunal conducting the September, 1972, grievance trial against petitioner.

24.

In support of his claim that he was singled out for selective prosecution, plaintiff would show that over the years, literally thousands of default judgments have been taken in the Dallas County Courthouse and elsewhere in the State of Texas. A large number of these defaults have been subsequently set aside on the grounds that the parties have made false statements or have omitted to make some disclosure or the other. However, no record can be found where any lawyer has ever been prosecuted before a Grievance Committee for the mode or manner in which he secured a default judgment.

25.

In support of his claim that he was singled out for selective prosecution, plaintiff would show that over the years, there have been many instances occurring in the Dallas County Courthouse and elsewhere in the State of Texas, wherein a lawyer has failed or refused to obey a direct order issued orally from the bench and relating to the conduct of a trial or similar legal proceedings then and there in progress. A large number of these lawyers have been fined and imprisoned or both for such disobedience. However, no record can be found where any lawyer has ever been prosecuted before a Grievance Commitee for any such disobedience. All such cases are subject to the presumption that the punishment inflicted at the time of the offense is sufficient punishment for the violation of the Court's orders in such instances.

26.

In further support of his claim that he was singled out for selective prosecution, plaintiff would show that through the established and accepted usage of the grievance machinery over the years and through all of the published pronouncements thereon, the principal function of the Grievance Committee has been to exclude from the practice of law those lawyers who have demonstrated themselves to be insufficiently skilled and experienced, and to further exclude those laywers who have demonstrated the tendency to betray the trust and confidence of a

client. Even if entirely true, the allegations against plaintiff Howell do not tend to establish that he is insufficiently skilled and experienced. Neither do they establish any tendency to betray a client's trust and confidence. Thus, the said allegations are entirely outside the scope of the normal and usual grievance prosecution as conducted over the years in Dallas County, Texas.

27.

In further support of his claim that he was singled out for selective prosecution, plaintiff would show that the said Grievance Committee consistently refuses to entertain complaints or enter any type of disciplinary judgment or order against its own kind; that is, establishment-type lawyers representing the monied and propertied interests. In such instances, the said Grievance Commitee has consistently passed by on the other side, even when the offending lawyer has been guilty of the most glaringly duplicitous, sometimes feloniously criminal conduct. On the other hand, the Grievance Committee has again and again singled out this plaintiff and other general practitioners, similarly situated, for prosecution for peripheral or trivial errors and mistakes.

28.

3rd Deprivation: Prosecutorial Misconduct: The said Grievance Committee, at least with respect to the proceedings against this plaintiff, has assumed the combined functions of investigator or arresting officer, prosecutor and tribunal. In the course thereof, the said Grievance Committee has been guilty of gross prosecutorial misconduct. It has attempted to cover up and conceal the fraudulent action and professional misconduct of Judge Walker in attempting to coerce the institution, prosecution and outcome of these proceedings. It has failed and refused to institute proceedings against Judge Walker for his fraudulent action and professional misconduct in tampering with Court papers and his fraudulent action and professional misconduct in the giving of false and misleading testimony when directly questioned before the Grievance Committee itself at the said September 1972, hearing. (see exhibit hereto quoting his testimony) It has failed and refused to take any action against the attorney representing the husband in the said Ralston case, Mr. Gerald R. Coplin, for his

fraudulent action and professional misconduct in failing to properly represent his client and in making false and misleading statements when directly questioned regarding his activities in the premises. It has further failed and refused to institute any proceedings against Judge Walker's legal adviser, Whitley R. Sessions for his fraudulent action and professional misconduct in failing to disclose, even when directly questioned, that he had advised and assisted Judge Walker in the institution of contempt proceedings and grievance proceedings against plaintiff Howell, and his fraudulent action and professional misconduct in making derogatory statements regarding Judge Holland and in the giving of false testimony when directly questioned with respect thereto, both at the September, 1972, grievance hearing and the July, 1972, contempt hearing.

29.

As a part of its prosecutorial misconduct, the said grievance committee deliberately suppressed and withheld evidence favorable to the defense which your plaintiff could have used at the September, 1972, grievance hearing and should be entitled to use at the State Court disbarment suit now pending against plaintiff. In particular, plaintiff Howell refers to evidence of misconduct of the said Judge Walker and attorneys Coplin and Sessions, which evidence constitutes valuable cross-examination and impeachment material.

30.

4th Deprivation: Punitive Burden Upon Right of Appeal: The aforesaid conditional vote to impose a six month suspension subject to the proviso that when this plaintiff refused to accept the same as final and sought appellate review, then the defendants would and did in fact institute proceedings for complete and permanent disbarment, constitute a punitive burden on the right of appeal. The avenues of appeal must be kept free of unreasoned distinctions. Even though Texas law provides that disbarment proceedings shall be tried according to civil rules of procedure, the inherent substantive nature of such proceedings is quasi-criminal. The respondant in a disciplinary proceedings may not be placed in

apprehension that if he is unsuccessful in his demand for appellate review of his conviction, he may be handed a stiffer and more onerous sentence. Insofar as the aforesaid State Bar rules provide for or permit such procedures, they are unconstitutional and void.

31.

5th Deprivation: Punitive Burden upon the Right to Choose an Occupation: This plaintiff is possessed of the Constitutionally guaranteed right to pursue any honorable and worthwhile occupation or calling which he may choose. This right is only limited by the public right to be protected from those who are insufficiently skilled and experienced or from those who have demonstrated a tendency to betray the client's trust and confidence. No conduct has been alleged against this plaintiff that would create a sufficient protection right of the public to override the personal right of the plaintiff to follow his chosen occupation.

32.

Plaintiff alleges that the State Bar rules do not provide and have not been construed as providing for exclusion from practice without regard to the balancing of the public interest against the personal interest as aforesaid, when specific and intelligible rules and regulations for the conduct of the practice of law are violated. Plaintiff alternatively alleges that any such provisions and constructions do not meet Constitutional standards and the same are void. Plaintiff further alleges that such question is not material to this case for reason that the State Court disbarment proceedings against this plaintiff do not charge plaintiff with the violation of any specific and intelligible statute, rule or regulation governing the practice of law by a licensed attorney.

33.

6th Deprivation: Vagueness and Overbreadth: The State Bar rules under which this plaintiff is being prosecuted are unconstitutionally vague in that men of ordinary intelligence and understanding must guess at their meaning and reasonable persons can easily differ in opinion as to whether or not certain conduct may or

may not be proscribed. Such rules purport to place limitations upon what a lawyer may or may not do in order to advance the interest of his client. Licensed attorneys are subject to the continuing apprehension that their conduct on behalf of their clients may be retrospectively declared by a Grievance Committee to constitute professional misconduct, and they are thereby inhibited from exercising zealous advocacy on behalf of their clients. The said rules are possessed of such overbreadth as to exercise a chilling effect upon the right of petition guaranteed by the First Amendment to the United States Constitution. The said rules are void for vagueness in violation of the Due Process Clause of the Fourteenth Amendment and are further void on grounds that they are tainted with First Amendment overbreadth.

34.

In the alternative, plaintiff alleges the State Bar rules are unconstitutional as applied to the claim that the taking of a default judgment around May of 1971 constituted a violation thereof. In securing this default judgment, plaintiff violated no specific and intelligible statute, rule or regulation. Neither was his conduct of a clearly opprobrious nature. At most, the alleged misconduct amounts to no more than the defective exercise of judgment of a borderline nature and may not be punished under the said State Bar rules.

35.

7th Deprivation: Attempts to Punish Misconduct of a Non-Professional Nature: Any misconduct of which plaintiff Howell may have been guilty in allegedly failing and refusing to reveal the names of attorneys consulted by him was not of a professional nature and plaintiff Howell may not be prosecuted for professional misconduct because of the same. The officers of the State Bar of Texas are governmental officers of the State of Texas and the sheriff of Dallas County, Texas, is likewise a governmental officer of the State of Texas. The State grievance machinery and the State criminal justice system are not dual sovereignties and the acts of one are binding upon the other.

36.

On or about October of 1972, plaintiff Howell appeared before the Court of Criminal Appeals of Texas to prosecute a petition for habeas corpus endeavoring to secure release from the custody of the sheriff of Dallas County, Texas, upon a conviction for failing and refusing to disclose to Judge Holland the names of the attorneys consulted by plaintiff Howell. The Assistant District Attorney of Dallas County, Texas, also a governmental officer of the State of Texas, appeared in the said proceedings and urged on behalf of the respondent State officer that in refusing to make the requested disclosures plaintiff Howell was acting in a private, personal and non-professional capacity. Such claim was received and adopted by the said Court and the election by the Sheriff and District Attorney to so contend in that proceeding is binding upon all officers and instrumentalities of the State of Texas. The Due Process and Equal Protection Clauses prohibit the officers of the same sovereignty from making conflicting claims in a different action against the same party while litigating essentially the same event.

JURY DEMAND:

37.

Plaintiff demands trial by jury of all issues which, under the law are subject to trial by jury.

PRAYER FOR RELIEF:

WHEREFORE, PLAINTIFF DEMANDS JUDGMENT AS FOLLOWS:

(1) For declaratory judgment that the disbarment suit against plaintiff was instituted and tried in the first instance before an invalidly constituted tribunal the Grievance Committee for the - - - ------ Fifth Bar District of Texas, that such proceedings are therefore void and that the present proceedings are likewise void.

(2) For declaratory judgment that in the aforesaid disbarment suit, plaintiff has been singled out and selectively prosecuted and for such reason, the said disbarment proceedings are void.

(3) For declaratory judgment that the said disbarment proceedings are so tainted with prosecutorial misconduct that plaintiff Howell has been deprived of a fundamentally fair trial and fundamentally fair proceedings, that the disbarment proceedings before Grievance Committee are void, and that the present proceedings are likewise void.

(4) For declaratory judgment that the procedures employed in ---------- conditionally voting for six months suspension and thereafter asking the State Court to enter complete and permanent disbarment constitutes a punitive burden upon the right of appeal, making the said disbarment proceedings void or alternatively, void insofar as they seek suspension of this plaintiff in excess of six months.

(5) For declaratory judgment that the disbarment suit against plaintiff does not allege conduct that would constitute due process grounds to remove plaintiff from his chosen occupation and that the said proceedings are therefore void as a punitive burden upon the right to pursue the occupation of this plaintiff's own choosing.

(6): For declaratory judgment that the State Bar rules either facially or as applied; in both instances, after taking any limiting constructions into consideration, are void for vagueness and overbreadth or either.

(7) For declaratory judgment that defendants are bound by elections heretofore made by other officers of the State of Texas contending in a judicial proceeding other than the present disbarment proceedings that plaintiff's conduct in allegedly failing or refusing to make disclosures to Judge Holland constituted conduct of a personal and non-professional nature. Plaintiff further asks declaratory judgment that the disbarment suit alleging such acts as professional misconduct is void.

(8) If it should develop before entry of final judgment herein

that a declaratory judgment as requested above will not adequately protect the plaintiff, then plaintiff alternatively asks that the final judgment contain an injunction against the prosecution of the aforesaid disbarment suit or parts thereof on each of the foregoing grounds.

(9) Pending a trial hereof on the merits, plaintiff prays the issuance of a preliminary injunction against proceeding to trial in the state action No. 74-9611E; the same being necessary in order to to preserve the status quo and protect the plaintiff from irreparable injury.

(10) Plaintiff asks for the costs of this action.

(11) Plaintiff asks for all other and further relief in such cases provided.

Respectfully submitted,
/S/ Charles Ben Howell

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Dallas, Texas 75214
Telephone 823-8400

[Filed March 1, 1976]

IN THE UNITED STATES DISTICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

CHARLES BEN HOWELL	§	
Plaintiff	§	
V.	§	**NO. CA-3-76-0280-C**
STATE BAR OF TEXAS, et al	§	
Defendants	§	

SECOND AMENDED COMPLAINT WITH EXHIBITS:

1. Petition #74-9611-E
2. Judgment #74-9611-E

JURISDICTION:

1.

This is an action seeking a declaratory judgment that certain disbarment proceedings brought by and on behalf of defendants and against this plaintiff have been prosecuted in violation of plaintiff's rights guaranteed by the Constitution and laws of the United States. Plaintiff further prays for injunctive relief. This action is brought under the provisions of 42 U.S.C. §§1983-1985, et seq. The District Courts of the United States have jurisdiction over this cause of action under the provisions of 28 U.S.C. §§1331, 1343, 1344, 1355, and 1357.

[Paragraphs 2-10 Deleted]

FEDERAL DEPRIVATIONS:

11.

The aforesaid disbarment action was prosecuted in violation of plaintiff Howell's rights guaranteed to him by the Due Process Clause, the Equal Protection Clause and the Privileges and Immunities Clause of the Fourteenth Amendment to the United

States Constitution. Such action further deprived plaintiff of rights, privileges and immunities secured by the Constitution and laws of the United States, and the same was done under color of state law.

12.

1st Deprivation: Disregarding Jury Verdict: Through state law, plaintiff was provided with the right of jury trial. While a jury was duly empaneled in the state court, defendants persuaded the state court judge after receiving the jury verdict to disregard the same and to enter a finding contrary to the express finding of the jury that plaintiff Howell did not engage in conduct that was prejudicial to the administration of justice. Disbarment actions are punitive or quasi-criminal in nature. Both Due Process and Equal Protection concepts prohibit a state court judge from disregarding a jury verdict in cases of this nature, and under the circumstances herein shown.

13.

2nd Deprivation: Vagueness and Over-reach: Plaintiff Howell was found guilty of violating a provision of the Texas Code of Professional Responsibility providing that a lawyer shall not engage in conduct that is prejudicial to the administration of justice. The said quasi-statutory provision, either facially, as applied or as construed by the Texas courts, is either void for vagueness or is unconstitutionally over-reaching or suffers from both vices. The provision is such that men of ordinary intelligence and understanding must guess at its meaning and reasonably persons can easily differ in opinion as to whether or not certain conduct may or may not be proscribed. Licensed attorneys are subject to the continuing apprehension that their conduct may be retrospectively declared prejudicial to the administration of justice. Lawyers are thereby inhibited from exercising zealous advocacy on behalf of their clients. The said provision is possessed of such overbreadth as to exercise a chilling effect upon the right of petition guaranteed by the First Amendement to the United States Constitution. The said provision is void for vagueness in vioaltion of the Due Process Clause of the Fourteenth Amendment and is further void on grounds that it is tainted with First Amendment overbreadth.

14.

3rd Deprivation: The Unconstitutional Switch: Plaintiff Howell was brought to trial upon the allegation that his conduct in failing and refusing to reveal the names of attorneys consulted by him constituted malpractice, fraudulent and dishonorable conduct in wilful violation of the aforesaid Code of Professional Responsibility. No evidence was introduced in support of such allegation and a directed verdict should have been issued thereon. However, defendants persuaded the state court to convict plaintiff of conduct prejudicial to the administration of justice even though no such charge had ever been made against plaintiff prior to the close of the evidence in the state court trial. Such action by defendants constituted an unconstitutional switch of grounds and deprived plaintiff of a fundamentally fair trial.

15.

In this connection, plaintiff would show that the said Code of Professional Responsibility specifically provides that a lawyer may disregard a ruling of a tribunal in good faith to test the validity of such ruling. In this connection, defendants produced no allegations or evidence of any lack of good faith on the part of plaintiff Howell and through the switch in grounds, defendants deprived plaintiff Howell of a fair opportunity to affirmatively plead or introduce evidence in support of a good faith claim.

16.

4th Deprivation: Punishment as Professional Misconduct for Conduct of a Non-Professional Nature: Any misconduct of which plaintiff Howell may have been guilty in allegedly failing and refusing to reveal the names of attorneys consulted by him was not of a professional nature and plaintiff Howell may not be prosecuted for professional misconduct because of the same. The Texas attorney disciplinary machinery and the Texas criminal justice system are not dual sovereignties and the acts of one are binding upon the other.

17.

On or about October of 1972, plaintiff Howell appeared before the Court of Criminal Appeals of Texas to prosecute a petition for habeas corpus endeavoring to secure release from the custody of the Sheriff of Dallas County, Texas, upon a conviction for failing and refusing to disclose to Judge Holland the names of the attorneys consulted by plaintiff Howell. The Assistant District Attorney of Dallas County Texas, also a governmental officer of the State of Texas, appeared in the said proceedings and urged on behalf of the respondent State officer that in refusing to make the requested disclosures, plaintiff Howell was acting in a private, personal and non-professional capacity. Such claim was received and adopted by the said Court and the election by the Sheriff and District Attorney to so contend in that proceeding, is binding upon all officers and instrumentalities of the State of Texas.

18.

The Due Proces and Equal Protection Clauses prohibit the officers of the same sovereignty from making conflicting claims in a different action against the same party while litigating essentially the same event. The subsequent judgment in the disbarment case holding plaintiff guilty of professional misconduct was and is void in that the State of Texas, by and through its duly constituted authorities secured from another court a holding that plaintiff Howell in failing and refusing to reveal the names of attorneys consulted by him was then and there engaged in conduct outside his professional sphere.

19.

5th Deprivation: Defective Grand Jury Proceedings: Under Texas law, grievance committee proceedings are comparable to grand jury action and no state court suit (formal complaint) may be filed against an attorney unless a majority vote be secured. In the state court action, it was alleged that the grievance committee had, by majority vote, decided to institute a formal complaint against plaintiff Howell. However, no constitutionally valid quorum was

present when the said committee voted to proceed. Under Texas law, the presence of seven grievance committee members was required in order to constitute a quorum. Because four of the ten members physically present were constitutionally disqualified and the remaining six did not constitute a quorum with respect to the business at hand, the subsequent prosecution of plaintiff was and is void.

JURY DEMAND:

20.

Plaintiff demands trial by jury of all issues which, under the law, are subject to trial by jury.

PRAYER FOR RELIEF:

WHEREFORE, PLAINTIFF DEMANDS JUDGMENT AS FOLLOWS:

(1) For declaratory judgment that the aforesaid judgment was obtained and secured under color of state law in violation of the Constitution and Laws of the United States.

(2) That defendants and their privies be enjoined from treating or regarding the aforesaid trial court judgment as an enforcable final judgment or from taking out any writs or process to enforce the said judgment or to recover the costs therein awarded.

(3) That defendants and their privies be further restrained and enjoined from the transmittal of certified copies of the aforesaid judgment and the complaint relating thereto or either of them to the Secretary of the State Bar of Texas or to the Clerk of the Supreme Court of Texas or from making any notation regarding the judgment on the membership roles thereof or from publishing the same in the official journal of the State Bar of Texas.

(4) That defendants and their privies be enjoined from entering the aforesaid disciplinary proceedings and judgment in the National Disciplinary Data Bank maintained by the American Bar Association.

(5) Plaintiff asks judgment for the costs and expenses of defending the said state court proceedings or, alternatively such portion thereof as was incurred after this court denied preliminary injunction and invoked abstention.

(6) Plaintiff asks judgment for the costs and expenses of the within cause of action.

(7) Plaintiff asks for all other and further relief in such cases provided.

[Signature Block, Certificate of Service, and Exhibits Deleted]

[Filed June 27, 1980]

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ALEXANDER L. STEVAS,
CLERK

NO. 82-397

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1982

State Bar of Texas,

Petitioner,

v.

Charles Ben Howell,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION TO CERTIORARI

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RESPONDENT'S QUESTION

Did the Court of Appeals not place its decision on such a narrow ground that Supreme Court review is wholly unwarranted?

ANSWER TO PETITIONER'S QUESTIONS

One: The Fifth Circuit held that in the ordinary instance, an attorney who has been disciplined may *not* have §1983 review of federal questions even after the state proceeding is complete. The ruling was error, but it was harmless in that the Court held the present action to be a special case.

Two: An error of a federal court would constitute a deprivation of the rights of the individual in the same manner and to the same extent as if the deprivation were procured by the state's attorney or the state court. Respondent has presented no distinguishing authority. The answer must be "No."

Three: Respondent's question is not subject to an abstract answer. While a §1983 action is not wholly exempt from *res judicata* and full faith, the rigorous application of those doctrines would seriously impair, if not stifle the principle that a litigant is entitled to a federal forum for his federal questions. The relationships and the rights asserted must be analyzed in each case. In the context of the present case, the answer is clearly "No."

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IN THE

Supreme Court Of The United States

OCTOBER TERM, 1982

State Bar of Texas,

Petitioner,

v.

Charles Ben Howell,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION TO CERTIORARI

Respondent Charles Ben Howell presents herewith his reasons why certiorari should not be granted in this case:

OPINION BELOW

The opinion of the Court of Appeals, 674 F.2d 1027 (A. 3) and the District Court's letter dated July 24, 1980 advising the basis of its decision (A. 12) are correctly reproduced in petitioner's appendix.[1] The petitioner has not

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[1]Respondent will employ the following abbreviations in referring to the record: (A.), Appendix attached to the Petition For Certiorari. (Ptn.), Petition For Writ of Certiorari.

Unless otherwise indicated, all emphasis has been supplied.

included the judgment of the Court of Appeals in the appendix.

JURISDICTION

The jurisdictional statement submitted by petitioner is correct.

STATUTORY PROVISION INVOLVED

42 USC, §1983: Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceedings for redress.

STATEMENT OF THE CASE

It is plain that petitioner has made an effort to state the case as favorably to its position as possible, but respondent will not burden the Court with a full restatement of the case in that petitioner's overstatement is not material to the question to be decided.

REASONS FOR DENYING THE WRIT

(1)

The Fifth Circuit laid its decision on the narrowest possible grounds. The principal grounds urged by respondent were rejected. The rejection was harmless because the Court nonetheless found the District Court's dismissal order to be erroneous and remanded.

Inasmuch as the District Court by its order induced respondent to reserve his federal claims for federal litigation, the Fifth Circuit, grounding its order both on fundamental fairness and legal precedent, decided that the federal court must give to respondent the hearing that was promised to him.

The Supreme Court is a court of discretionary jurisdiction. What "special and important reasons" have been advanced by petitioner for review on certiorari? It is not conceivable that a circumstance comparable to the one shown will occur save in the rarest instance. Petitioner has not explained why the Supreme Court should hear argument in this case. To the contrary it is stated:

> "This is not itself a case in which the public interest would be immediately and seriously endangered by further litigation in federal court * * *" (Ptn. 14).

The petition concludes by stating:

> "[Petitioner] cannot know how the Fifth Circuit's exceptions will be used in the future. * * * We fear these exceptions will be applied beyond the facts of this case" (Ptn. 19).

As we read the petition, petitioner has conceded that it has no reason for opposing this §1983 action except out of fear that the right to fede al review in state attorney discipline cases will be expanded in the future. It is a principle of constitutional law that the courts, particularly the Supreme Court, will not decide constitutional principles unless they are squarely and necessarily presented. This case is not a proper vehicle for determining whether or not §1983 review is available as a general proposition in attorney discipline cases. That question must abide another day when it is raised in a context not involving the narrow, special considerations here involved.

(2)

Although the grounds of the Court's ruling are narrow, they are well supported. *England v. Exrs.*, 375 US 411 (64) is a virtual white horse case. It involves the licensing and regulation of professional groups by the state. A group of chiropractors there brought suit in federal court challenging the regulatory plan to which they were being subjected. Obviously, they anticipated disciplinary action. The United States District Court held the professionals there involved should first seek state court construction of the regulatory scheme. The Supreme Court held that subsequent federal review could not be denied on grounds of res judicata when the professionals returned to federal court because they were only doing what they were told that they must do as a prerequisite to obtaining federal relief.

The case at bar fits the *England* precedent hand in glove. Petitioner has argued *England* to be inapplicable because those plaintiffs were supposedly *ordered* to go to

the state court, whereas, as it is urged, the federal district court below, gave no order whatever.

The attempted distinction does not exist. No mandatory order was ever passed requiring the *England* professionals to engage in any affirmative action whatever. That is to say, there was never an order in the nature of a mandatory injunction wherein a party is directed to remove his encroachment from the opposing party's property forthwith on pain of fine and imprisonment for contempt. The federal district court below spoke conditionally only and the federal district court in *England* spoke in the identical manner: "You may not have federal relief until the matter complained of has been litigated in state court." The notion that the *England* professionals were directly ordered to do anything is incomprehensible. The cases are identical.

The Due Process Clause is a safeguard against all conceivable types of official misconduct. Inasmuch as those who act on behalf of petitioner are state officers, they are subject to the limitations of the Due Process Clause of the *Fourteenth Amendment* and the judges of the state courts are likewise subject to that clause. At the same time, there is a Due Process Clause within the *Fifth Amendment* which operates against federal officers, including federal judges. Inasmuch as the federal court represented to respondent that he might have federal review of his federal questions as long as they were reserved and withheld in the pending state proceeding, it would be a direct deprival of due process to allow the federal district court to reverse its ruling after the time to present federal questions to the state court was past. A litigant is entitled to rely upon the procedural rulings of a federal court. The ruling, in effect,

became the law of the case, and applies to this particular case, whether or not it is sound as a general proposition.

Before this Court, petitioner has not drawn any significant distinction between *Howell* and *England*. To the contrary, petitioner would prefer to ignore *England* and hope that it will be overlooked.

Contrariwise, respondent urges that *England* is controlling. *England* has been cited by the Supreme Court on many subsequent occasions. Petitioner appears to contend that *England* was overruled or limited by *Allen v. McCurry* (Ptn. 16-17). The Supreme Court expressly denied as much and stated:

> "Where a plaintiff properly invokes federal court jurisdiction in the first instance on a federal claim, the federal court has a duty to accept that jurisdiction. * * * Abstention may serve only to postpone, rather than to abdicate jurisdiction, since its purpose is to determine whether resolution of the federal question is even necessary." *Id.*, n. 17.

(3)

It is contended that the case at bar conflicts with the decisions of other courts of appeal concerning the application of *res judicata*. No conflict with a decision of the Supreme Court is alleged. Whether the decision would conflict with the ruling of another court of appeals on the same facts is problematical at most. For certain, the petition does not cite any case wherein the fact situation was at all similar. In fact, most of the authorities cited are not even professional discipline cases.

The reservation rule contained in *England* has no application unless the affected individual is (a) forced to litigate against his will (b) in a state court (c) against a state officer or authority. In *Scoggin* and *Spence* (Ptn. 13) it appears that the federal plaintiffs had each previously selected the state forum. *Robbins* and *Blankner* (Ptn. 13) respectively involve child custody and land condemnation. They are too far on their facts to be of assistance in determining the rule applicable to professional discipline cases in general or disbarment cases in particular.

Coogan (Ptn. 12) is the only professional license case other than *England* cited under petitioner's first point. That case has been effectively overruled by the subsequent Sixth Circuit case of *Getty v. Reed*, discussed below. Contrary to the assertion made in point one, petitioner has not cited a single case to indicate that the *Howell* case, on its peculiar facts, would be differently decided in any other circuit.

(4)

As we read the petition, the essential position of petitioner is that there may be no §1983 review of state professional license litigation. The argument is sweeping and monolithic. No exceptions are stated or recognized. While a tenable argument to this effect might have been made twenty or even thirty years ago, it simply does not conform to the 1982 concept of the powers and responsibilities of federal courts.

There are a number of other cases from around the country upholding §1983 jurisdiction over state professional license litigation. Because the underlying law of each state can be a substantial factor, the cases are only illustrative of the point in hand. We cite them for the purpose of

dispelling any notion that §1983 jurisdiction has been limited to the State Bar of Texas. *Taylor v. Bar,* 424 F.2d 478 (6-KY 70); *Webster v. Wofford,* 321 FS 1259 (3 Judge NDGA 70); *DaVita v. Sills,* 422 F.2d 1172 (3-NJ 70); *Lipman v. Van Zant,* 329 FS 391 (NDMS 71); *Getty v. Reed,* 547 F.2d 971 (6-KY 77); *Erdmann v. Stevens,* 458 F.2d 1205 (2-NY 72) and *Niles v. Lowe,* 407 FS 132 (3-Judge DCHI 76).

In *Getty v. Reed,* 413 FS 511 (EDKY 76), the District Court dismissed a §1983 action by a disbarred attorney concluding that it had "no jurisdiction" and that certiorari was the exclusive means of review. The Sixth Circuit reversed. *Getty v. Reed,* 544 F.2d 971 (6-KY 77). Held, certiorari to the Supreme Court is not the *exclusive* (emphasis: *exclusive*) means to review state court attorney discipline proceedings. District courts do have jurisdiction thereof under §1983. An earlier Sixth Circuit case to the same effect is *Taylor v. Bar,* supra. *Getty* has now been expressly followed in the Eighth Circuit, *Peterson v. Sheran,* 635 F.2d 1335 (8-MN 80).

> "Appellee's argument seems to be that, because decisions of the highest state court on federal constitutional issues can only be reviewed in the United States Supreme Court, relief from deprivations of constitutional rights in state judicial proceedings is not available under 42 U.S.C. §1983 * * *. We reject this contention. Federal courts have jurisdiction over claims that state judicial proceedings have resulted in deprivations of federal constitutional rights * * *."

The foregoing are primarily the authorities upon which respondent urged the courts below to act. The Court of

Appeals placed its decision on much narrower grounds. Petitioner has no basis to complain as to the narrowness of the Fifth Circuit's ruling.

(5)

The principal thrust of petitioner's second point, as we read it, is to urge that abstention should be made the equivalent of abdication in attorney discipline cases. No authority is submitted for this proposition. It is submitted that petitioner has misapprehended the entire nature of the abstention doctrine:

> "This principle [abstention] does not, of course, involve the abdication of federal jurisdiction, but only the postponement of its exercise * * *." *Harrison v. NAACP*, 360 US 167, 177 (59).

> "Section 1983 was * * * a product of a vast transformation from the concepts of federalism that had prevailed in the late 18th century * * *. The very purpose of §1983 was to interpose the federal courts between the States and the people, as guardians of the people's federal rights — to protect the people from unconstitutional action under color of state law, 'whether that action be executive, legislative *or judicial*.' * * * This Court long ago recognized that federal injunctive relief against a state court proceeding can, in some circumstances be essential to prevent * * * loss of a person's constitutional rights." *Mitchum v. Foster*, 407 U.S. 225 (72) (Emphasis supplied).

"Younger is not an abdication of the federal role in protecting citizens from 'official lawlessness.' " *Medrano v. Allee*, 347 FS 605 (3-Judge SD TX 72), *aff'd in part*, 416 US 802 (74).

"The subject matter jurisdiction of the lower federal courts was greatly expanded in the wake of the Civil War. A pervasive sense of nationalism led to enactment of the Civil Rights Act * * * empowering the lower federal courts to determine the constitutionality of actions, taken by persons under color of state law * * *. [With later enactment of federal-question jurisdiction,] the lower federal courts * * * 'became the *primary* and powerful resource for vindicating every right given by the Constitution, the laws and treaties of the United States' ". *Steffel v. Thompson*, 415 US 452, 464 (74).

(6)

Rooker (Ptn. 17-19) would still be controlling as to the facts shown in that case. However, the notion that federal courts lack jurisdiction to examine decisions of the state courts for compliance with the Constitution and laws of the United States had been laid to rest even long before *Rooker* was written. Jurisdiction is synonymous with power. The power to so review state court proceedings springs from the *Fourteenth Amendment*. *Ex parte Royall*, 117 US 241 (1886). The question runs not to the existence of power (jurisdiction) but to the proper exercise thereof. *Rooker* has caused untold confusion by failing to make this distinction plain. In *Supreme Court v. Consumers*,

446 US 719 (80), the notion that *Rooker* was an authority concerning the *jurisdiction* of federal courts was substantially put at rest:

> "* * * We have never held that judicial immunity absolutely insulates judges from declaratory or injunctive relief with respect to their judicial acts. The Courts of Appeals appear to be divided on the question * * *; we have not addressed the question.
>
> "* * * We believe that the Virginia Court and its Chief Justice properly were held liable in their enforcement capacities. [A Virginia statute] gives the Virginia Court independent authority of its own to initiate proceedings against attorneys. For this reason the Virginia Court and its members were proper defendants in a suit for declaratory and injunctive relief, *just as other enforcement officers and agencies were.*" (Emphasis supplied).

Consumers in turn was foreshadowed by *O'Shea v. Littleton,* 414 US 488 (74).

(7)

Theard (Ptn. 17-19) is no authority with respect to §1983 jurisdiction over professional license cases. The case *did not* involve §1983. The case *did not* involve any question concerning the jurisdiction of the federal district courts nor the proper exercise of such jurisdiction. The case *did not* involve the validity of any state disbarment proceedings. The case *only* involved the question of procedural due process to be applied by the *federal district courts* in ex-

cluding lawyers from practicing before the *federal district courts.*

As pointed out by petitioner (Ptn. 18), various of the circuits have cited *Theard* in declining to entertain §1983 jurisdiction over attorney discipline cases. However, *Theard* was primarily a makeweight and other grounds were stated. Those other grounds are either inapplicable to the present case or they have been distinguished away.

Mr. Justice Frankfurter's observation that the two judicial systems are "autonomous" is obvious dicta and has been blown out of all proportion. Insofar as we know, all state officials are autonomous. The notion that their autonomy places state boards, police officials, prison officials, medical licensing boards, barber licensing boards and masseuse licensing authorities beyond the reach of §1983 simply will not comport with the 1982 concept of the powers and duties of the federal courts.

(8)

In the wake of *England,* many other professional license cases have been accepted into the district courts under §1983 after those cases had been to the state court. In the case of *Silverman v. Browning,* 414 FS 80 (3-Judge DCCN 76) *aff'd,* 429 U.S. 876 (76), the federal claims had been presented to the state court but the state court did not rule on them. Construing *England,* the three judge court concluded that there are two elements, and two elements only to the *England* test: (1) Whether the state court actually passed upon the federal claims and (2) whether or not such was done at the request of the party seeking to

litigate the same federal claims before the United States District Court.

> "* * * The Court finds that in light of the state court's action in not passing upon the constitutional issues, the plaintiff is not foreclosed from returning to this Court * * *."

Silverman was affirmed by the Supreme Court without opinion. Such affirmance constitutes a ruling upon the merits.

Silverman v. Browning, supra, rebuts the notion that the *England* doctrine has been diluted by loose language in *Huffman v. Pursue*, 420 US 592 (75) or otherwise. We further draw attention to *MT v. US*, 440 US 147 (79) where it was stated:

> "As we held in *England*, the abstention doctrine may not serve as a vehicle of depriving individuals of an otherwise cognizable right to have federal courts make factual determinations essential to the resolution of federal questions."

It is established that a party forced to litigate in the state court need not even commence federal proceedings until the state action is adversely decided. The only bar to subsequent federal litigation is (1) a state court ruling upon federal issues (2) which was rendered at the request of the party who later brings a §1983 action. *Mack v. Board*, 430 F.2d 862 (5-FL 70); *Lombard v. Board*, 502 F.2d 631 (2-NY 74); *Newman v. Board*, 508 F.2d 277 (2-NY 75); *Graves v. Olgiatti*, 550 F.2d 1327 (2-NY 77); *Board v. Tomanio*, 603 F.2d 255 (2-NY 79), *rvsd oth gds* 446 US 478 (80).

A certiorari petition by the defendant state agency was denied in *FL St. v. Mack,* 401 US 960 (71). The denial has considerable significance because it drew two dissenting opinions; which in turn clearly reflects that a substantial majority of the Court considered the decision of the Court of Appeals to be correct.

CONCLUSION

The petition for a writ of certiorari to review the judgment and opinion of the Fifth Circuit should be denied.

Respectfully submitted,

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